Supreme Court, U.S.
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90-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. _____

TOWN OF BABYLON and
TOWN OF HEMPSTEAD,

Petitioners,

-against-

NATIONAL ADVERTISING COMPANY,
INCORPORATED VILLAGE OF LINDENHURST,
TOWN OF OYSTER BAY, INCORPORATED,
VILLAGE OF FREEPORT, TOWN OF ISLIP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Must a governmental defendant, in defending a statute which impacts upon the freedom of speech clause of the First Amendment, offer either a legislative purpose provision inherent within that statute or "extrinsic evidence" of the governmental interest which motivated the legislature to enact the statute, in order to entitle it to an application of the appropriate standard of constitutional review?

2. Is extrinsic evidence necessary to establish that the Towns of Babylon and Hempstead possess substantial governmental interests in traffic safety and esthetics so as to justify the regulation of outdoor signs and billboards, given this Court's prior opinions and the findings of fact and conclusions of law delineated in numerous published opinions which have considered the issue?

3. Does a municipal outdoor sign ordinance, which regulates commercial and non-commercial off-premises copy equally, violate the First Amendment?

LIST OF PARTIES

The plaintiff in this action is National Advertising Company. The original defendants were the Towns of Babylon, Hempstead, Islip, Oyster Bay, and Brookhaven and the Incorporated Villages of Freeport, Lindenhurst and Amityville. However, the action as against Brookhaven and Amityville was withdrawn by National prior to the entry of judgment in the District Court.

All parties in the District Court action excluding the Incoporated Village of Lindenhurst were also parties in the Court of Appeals proceedings. The petitioners before this Court are the Towns of Babylon and Hempstead.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit is reported at 900 F.2d 551 (2d Cir. 1990), and is printed in Appendix A. The opinion of the United States District Court for the Eastern District of New York is reported at 703 F.Supp. 228 (E.D.N.Y. 1989), and is printed in Appendix B. The judgment of the United States District Court for the Eastern District of New York is printed in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the

Second Circuit was entered on April 3, 1990, affirming the judgment of the United States District Court for the Eastern District of New York. No petition for rehearing was sought. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are attached as Appendices E and F, respectively.

Article XIX of Chapter 213 of the Code of the Town of Babylon, Sections 213-251 through 213-255, is attached as Appendix G.

Article XXIV of the Building Zone Ordinance of the Town of Hempstead, Sections 242 through 250, is attached as Appendix H.

STATEMENT OF THE CASE

National Advertising Company (hereinafter "National"), a Delaware corporation and a subsidiary of Minnesota Mining and Manufacturing Company (3M), is engaged in the business of outdoor advertising. National conducts its operations by leasing real estate upon which it erects and maintains large billboards. National then leases space on these billboards to third parties.

On or about January 13, 1988, National instituted the present action in the United States District Court for the Eastern

District of New York. On the following day, National instituted a motion for a Preliminary Injunction to permit it to initiate construction of the prospective billboards. On April 4, 1988, Judge Wexler issued an Order converting, sue sponte, the motion for a Preliminary Injunction into a motion for Summary Judgment. He allowed the parties only ten days to submit additional evidence. On December 4, 1988, Judge Wexler rendered a decision finding the Babylon and Hempstead ordinances unconstitutional on their face since they did not contain a legislative purpose provision and no "extrinsic evidence" of the purpose of the Towns in enacting the ordinances was offered.

The United States Court of Appeals for the Second Circuit affirmed Judge Wexler's decision as to Babylon and Hempstead and struck the sign ordinances of those municipalities *in their entirety,* including the off-premises advertising restrictions, as well as all of the content-neutral provisions.

Original jurisdiction was established by virtue of the fact that the action arises under the First and Fourteenth Amendments to the United States Constitution, and under 42 U.S.C. 1983, subject matter jurisdiction in the District Court was established under 28 U.S.C. 1331 and 1343 (3) and (4). Subject matter jurisdiction also arises based on the diversity of citizenship existing between plaintiff and defendants coupled with the fact that the amount in controversy, upon information and belief, exceeds the sum of $10,000, exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

The opinion of the Second Circuit creates a new and distinct standard of constitutional scrutiny. It manifests that unless a governmental defendant can either produce a legislative purpose provision inherent within the statute itself or offer "extrinsic evidence" of the governmental interest which motivated the legislature to enact the statute, a court will not conduct constitutional review and will strike the statute in its entirety. The test delineated by the Second Circuit thus functions as a new and distinct preliminary question in all free speech cases, which directly conflicts with the well-established position of this Court. It permits a court to circumvent this Court's prior holdings and to achieve results in direct contradiction to the settled precept this Court has long enunciated. The test thus allows for a total subversion of all forms of First Amendment scrutiny.

Further, the test itself is internally flawed. It confuses legislative motivation with governmental interest and elevates the former from its role in statutory construction and interjects it, in place of the latter, into constitutional analysis. The test then intertwines legislative purpose with the unrelated evidentiary issue of "extrinsic evidence" and requires, contrary to the proclamations of this Court, that such evidence must, in the abstract, be offered in order for the statute to be afforded constitutional scrutiny. Such a holding would extinguish the settled rule that a governmental defendant may rely upon the experiences of other municipalities, including those found in published opinions, in support of its laws. The holding also ignores the fundamental precepts that bind the Circuit and lower courts to the holdings of this Court.

The standard of review adopted by the Second Circuit, while harmonious with the Eleventh Circuit, directly conflicts with the positions of the First, Third, Fourth, Sixth and Ninth Circuits as well as the New York Court of Appeals. Finally, the test imposes additional and substantial burdens upon the legislature without providing any corresponding benefit to those who wish to engage in the regulated activity or the population in general.

A correct application of the pertinent standard of review to the content-neutral provisions which comprise the majority of the sign codes of both Towns and the off-premises copy restriction (which affects both commercial and noncommercial copy equally) clearly results in a finding of constitutionality. Finally, assuming, in arguendo, that the off-premises copy restriction was found to violate the First Amendment, it is plainly severable from the content-neutral provisions.

Petitioners urge the Court to examine each of the sign codes independently in accordance with the applicable standards and the reasoning set forth below.

POINT I

THE TEST PROMULGATED BY THE COURT OF APPEALS IS INTERNALLY FLAWED, IS CONTRARY TO THE HOLDINGS OF THIS COURT AND UNDERMINES THE BASIC PRECEPTS OF CONSTITUTIONAL ANALYSIS.

Both the United States Court of Appeals for the Second Circuit and Judge Wexler held the Ordinances of the Towns of

Babylon and Hempstead unconstitutional because they did not contain a legislative purpose provision and the towns failed to offer "extrinsic evidence" of a substantial governmental interest which motivated the Towns to enact the ordinances. *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990); *National Advertising Co. v. Town of Babylon*, 703 F.Supp. 228 (E.D.N.Y. 1981), *aff'd*, 900 F.2d 551 (2d Cir. 1990).

The preliminary question enunciated by the Second Circuit allows a court to avoid conducting constitutional analysis. Rather than applying the commercial and noncommercial speech tests to the off-premises copy prohibition and the content-neutral test to the other sign restrictions, the Second Circuit crafted its own test and struck the entire sign codes of both municipalities.

The doctrine relied upon by that court is, in actuality, not contained within any recognized test and constitutes a new and distinct standard of review. In essence, that standard provides that the court will not apply constitutional scrutiny until the defendant municipality either advances a legislative purpose provision inherent in the ordinance itself or offers "extrinsic evidence" of the purpose of the legislature in enacting the ordinance. The test thus functions as the initial question in constitutional analysis and allows a court to avoid applying any other test.

This Court's position has consistently been that a court is not constrained to receive assertions of governmental interest from the two sources enunciated by the Second Circuit. In *Posadas de Puerto Rico Association v. Tourism Company*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed. 266 (1986), this Court

upheld a Puerto Rico statute restricting the advertisement of casino gambling on the basis of a governmental interest asserted in Appellee's brief and not documented by either a corresponding legislative purpose provision or any extrinsic evidence. *Id.*, at 341-342, 106 S.Ct. at 2976-2977. *See also Arkansas Writers' Product, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (Supreme Court received and assessed the nature and magnitude of a governmental interest offered for the first time at oral argument on content-based restrictions concerning free speech). In the absence of either a purpose provision or extrinsic evidence, this Court held that "[t]he Puerto Rico Legislature obviously believed, when it enacted the advertising restriction at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . . ." *Posadas,* 478 U.S. at 341-342, 106 S.Ct. at 2977. This Court reached such a determination over the vigorous assertions of Appellants and Amicus Curiae, who repeatedly stated that no evidence whatsoever was ever advanced to support a conclusion or the existence of a governmental interest.

Further, in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), this Court did not require extrinsic evidence to support its determination that esthetics and traffic safety are substantial governmental interests or its conclusion that the ordinance directly advanced those goals, despite the "meager" record. 453 U.S. at 507-508, 101 S.Ct. at 2892-2893. *See also* 453 U.S. at 541-542, 101 S.Ct. at 2909-2910 (Stevens, J., dissenting in part); 453 U.S. at 556-557, 559-561, 101 S.Ct. 29178-2920 (Burger, C.J., dissenting); 453 U.S. at 569-570, 101 S.Ct. at 2924-2925 (Rehnquist, J., dissenting). The plurality opinion of Justice White

stated, "We likewise hesitate to disagree with the accumulated common-sense judgments of local lawmakers and of the many reviewing Courts that billboards are real and substantial hazards to traffic safety." 453 U.S. at 509, 101 S.Ct. at 2893. *See also* 453 U.S. at 541-542, 101 S.Ct. at 2909-2910 (Stevens, J., dissenting in part) 453 U.S. at 560-561, 101 S.Ct. 2920 (Burger, C.J., dissenting); 453 U.S. at 569-570, 101 S.Ct. at 2924-2925 (Rehnquist, J., dissenting).

The position also completely ignores the rudimentary maxim that municipalities defending of their ordinances, including those which touch upon the First Amendment, are entitled to rely upon the experiences of other municipalities in lieu of evidence regarding the effects of the regulated activity. *City of Renton,* 475 U.S. 41, 45-53, 106 S.Ct. 925, 928-931, 89 L.Ed.2d (1986). The Second Circuit's preliminary question would completely swallow this elementary principle.

In addition, once such an interest is established by this Court, the lower courts must recognize that interest in conducting constitutional analysis. In the present action, the Second Circuit was constrained to note the governmental interest in esthetics and traffic safety that underpinned the Sign Codes and to pass to the particularity of the challenged ordinances. Instead, it crafted a new and ill-founded test which allowed it to strike the ordinances in their entirety.

The proper approach was taken by this Court in *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.,* 467 U.S. 447, 104 S.Ct. 2839, 81 L.Ed.2d 786, (1984), where it relied on its prior decision in *Village of Schaumburg v. Citizens For a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73, (1980), for the proposition that the States pos-

sess a substantial governmental interest in protecting the public against fraud. The Court then went on to indicate that in an instance when the existence of a substantial governmental interest has been recognized, courts should note that interest and pass on the particularities of the ordinance at hand; i.e., the "fit" of the statute to the established interests. *Secretary of State of Maryland v. Joseph H. Munson Company,* 467 U.S. 447, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). Accord, *City of Renton,* 475 U.S. at 47-51, 101 S.Ct. at 928-930.

Moreover, constructing a system of analysis which combines the abstract requirement for such evidence with the existence of a legislative purpose provision is internally flawed and the position plainly untenable. The mere existence of the former is not outcome determinative and the relationship of the latter to constitutional analysis is completely missing (absent some internal ambiguity within the statute which makes statutory construction a prerequisite to constitutional scrutiny).

It is now quite well settled that a court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motivation. *See United States v. O'Brien,* 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968); *City of Renton v. Playtime Theatre, Inc.,* 475 U.S. 41, 46-49, 106 S.Ct. 925, 928-930, 89 L.Ed.2d 29 (1986). The fundamental precept underlying this principle is that the purpose of the legislature in enacting a statute is clearly distinguishable from the governmental interest which that statute serves. *Id.* Legislative purpose and governmental interest are distinguishable, arise from divergent circumstances, and serve separate and distinct functions. Legislative purpose exists as a principal concern in statutory construction; governmental interest,

on the other hand, exists as a prime component in constitutional analysis. *See O'Brien,* 391 U.S. at 383-386, 88 S.Ct. at 1682-1684.

Furthermore, the Towns need not even demonstrate the original legislative motivation or that the motivation was, in fact, constitutional. So long as, upon application of the appropriate standard of review, a governmental interest exists which is of such a nature and magnitude as to satisfy that standard and the appropriate relationship which lies between that interest and the statute at issue, then that statute shall pass muster regardless of any divergent legislative motivation. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 71-72, 103 S.Ct. 2875, 2882-2883, 77 L.Ed.2d 469 (1983). *See also Ohralik v. Ohio State Bar Association.,* 456 U.S. 447, 460, 98 S.Ct. 1912, 1928, 56 L.Ed.2d 444 (1978); *Doe v. Bolton,* 410 U.S. 179, 190-191, 93 S.Ct. 739, 746-747, 35 L.Ed.2d. 201 (1973). Moreoever, the existence of a stated or ascertainable legislative purpose does not limit the parameters of the field of governmental interests which a statute might serve and such an interest need not exist at the time of enactment. *Bolger,* 463 U.S. at 71-72, 103 S.Ct. at 2882-2833; *Ohralik,* 456 U.S. at 460, 98 S.Ct. at 1928; *Bolton,* 410 U.S. at 190-191, 93 S.Ct. 746-747.

The mere existence or non existence of such evidence in the record, in and of itself, does not determine constitutionality. It is the application of applicable standard of judicial scrutiny which fosters such a determination. This is not to say that a municipality need never offer "extrinsic evidence." In an instance where the existence of a governmental interest is unclear, such evidence will certainly be helpful and may even be necessary to demonstrate both the existence and gravity of

that interest. Also, in a particular case such evidence may be crucial to establish a link between the asserted interest and the restriction at issue.

However, when both governmental interest and corresponding relationship are firmly established and well recognized by this Court, "extrinsic evidence" is unnecessary. The Second Circuit's mandate that a municipality collect and advance such evidence is merely burdensome and can only foster disparity and conflict. It would also duplicate effort and deter judicial economy. A reliance on the standard of review espoused by the Second Circuit is ill founded and quite contrary to established precedent. The commercial speech test requires a court to assess the nature and scope of an asserted governmental interest and then ascertain whether the ordinance directly advances that interest. The noncommercial speech test and the test applicable to content-neutral regulations function similarly. While "extrinsic evidence" may, in a particular case, be helpful or even decisive in this regard, it does not alter the fact that the failure to offer such evidence, in and of itself, is not fatal, or that in the present case no such evidence was required.

By confining its inquiry to the existence of a legislative purpose provision or "extrinsic evidence," the Second Circuit failed to conduct constitutional analysis; it failed to apply the appropriate standards of review. Such action is tantamount to a finding of no substantial governmental interest and is in direct opposition to the decisions of this Court. The position would allow the lower courts to pass anew on questions which this Court has already decided and therefore would pose grave risks of disparity of conclusions and application of law which run to the heart of our system of jurisprudence.

POINT II

THE POSITION OF THE SECOND AND ELEVENTH CIRCUITS CONFLICTS WITH THAT OF THE FIRST, THIRD, FOURTH, SIXTH, AND NINTH CIRCUITS AND THE NEW YORK COURT OF APPEALS.

The proper, yet contrary, approach was taken by the Ninth Circuit in a remarkably similar case, *National Advertising Company v. City of Orange*, 861 F.2d 246 (9th Cir. 1988). In that case the court began its analysis by noting, "Standards for addressing the Constitutionality of billboard restrictions are found in the Supreme Court's opinions in *Metromedia* and *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)." 861 F.2d at 298. The Ninth Circuit clearly affords *Metromedia* its proper weight and correctly applies *Central Hudson* to the ordinance at issue. The decision of the Second Circuit in essence constitutes a refusal to supply *Central Hudson* as well as the other tests regarding constitutionality under the First Amendment's freedom of speech clause and a circumvention of *Metromedia* and *Taxpayers for Vincent*.

The Fourth Circuit has been the most prolific in this area and has rendered several opinions concerning outdoor sign ordinances since this Court rendered its opinion in *Metromedia*. The Fourth Circuit has found that this Court's decision in *Metromedia* clearly delineates that substantial governmental interests exist in the regulation of outdoor signs and that a "fit" between such interests and height, size, location, etc., provisions and restrictions on off-premises commercial adver-

tising is plainly manifest. *Naegele Outdoor Advertising Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988); *Georgia Outdoor Advertising Inc. v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987); *Major Media of the Southeast v. Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987).

In *Major Media of the Southeast*, the Fourth Circuit Court properly noted that as this Court has determined that a municipality may prohibit all off-premises signs or billboards for esthetic and traffic safety reasons, its inquiry into such matters was foreclosed and it must focus its attention on the particular distinction of the ordinance before it. 792 F.2d at 1272. One year later, in *Georgia Outdoor Advertising*, that court once again had cause to examine an ordinance prohibiting billboards. The Court stated "the issues we address, however, have already been considered in cases that constitute pervasive or controlling precedent. . . ." 833 F.2d at 45. The court went on to cite this Court's decision in *Central Hudson* and *Metromedia* as well as its own decision in *Major Media*.

Similarly, the Third Circuit has adopted the view that a municipality need not establish its governmental interest or corresponding nexus to the regulations at issue by empirical data; so long as the ordinance is facially reasonable, the legislative judgment will be deferred to by the courts. *Frumer v. Cheltenham Township*, 709 F.2d 874, 887 (3d Cir. 1983). A contradictory approach has also been taken by the Sixth Circuit in *Wheeler v. Commissioner of Highways of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988), and the First Circuit in *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985) and *John Donnelly and Sons v. Campbell*, 639 F.2d 6 (1st Cir.

1980), *aff'd mem.*, 453 U.S. 916, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981).

The Second Circuit's position becomes even more compelling in light of its reliance on *Dills v. Marietta*, 574 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983), in which the Eleventh Circuit adopted a virtually identical standard. The Eleventh Circuit further indicated that it would pass beyond any stated purpose and delve into the hearts and minds of the legislators who voted for the statute to ascertain their true motivation. Such reasoning not only offends the traditional standards of judicial scrutiny, but would extinguish the doctrine of legislative privilege. *See Tenny v. Brandhouse*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed.2d 1019 (1951); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

That two Circuits have now adopted such a stance makes the matter most compelling. Further, it remains to be seen whether those Circuits which have not yet considered these issues will adopt the ill-founded position of the Second and Eleventh Circuits. A firm statement of this Court providing guidance to the Circuits and lower courts is severely needed.

The test crafted by the Second and Eleventh Circuits places an additional and substantial burden upon municipalities and fails to bestow any corresponding benefit upon the individuals who wish to engage in the regulated activity or the population in general. Further, if an ordinance is struck pursuant to the Second Circuit's promulgation, constitutional adjudication is completely forestalled, thus leaving lawmakers and the general population completely in the dark as to the sufficiency of

the regulation. As such, and after substantial litigation and expense, neither party can say how the restriction itself fares. Such would result in a second round of litigation, which can only entail more expense and more delay. The issue is especially compelling in a case such as the present one, where the governmental interest and the nexus between that interest and the type of regulation at issue is thoroughly recognized and firmly established.

The test adopted by the Second Circuit constitutes a new and distinct standard of review, which is ill premised and allows for a circumvention of the well-established First Amendment standard of review. The magnitude of the matter, which is compelling in itself, is augmented by the conflict which exists between the Second and Eleventh and the First, Third, Fourth, Sixth and Ninth Circuits and the New York Court of Appeals. The possibilities inherent within the adopted standard, clearly evidenced by the Second Circuit's treatment of the Babylon and Hempstead Ordinances, are severe in nature and pose great danger of divergent holdings, which risk the very foundation of our system of jurisprudence. A statement by this Court is most needed.

Finally, this action also embraces the question of whether a municipality may regulate both off-premises commercial and noncommercial speech equally and not offend the First Amendment. *Metromedia* indicated that such is possible but did not pass on the issue.

POINT III

THE REGULATION OF OFF-PREMISES COMMERCIAL AND NONCOMMERCIAL SPEECH EQUALLY DOES NOT VIOLATE THE FIRST AMENDMENT.

Finally, this action also embraces the question of whether a municipality may regulate both off-premises commercial and noncommercial speech equally and not offend the First Amendment. *Metromedia* indicated that such is possible but did not pass on the issue.

The Babylon and Hempstead Ordinances are distinguishable from the San Diego ordinance held unconstitutional in *Metromedia* since they do not prefer commercial speech over noncommercial speech. *Metromedia,* 453 U.S. at 512-513, 101 S.Ct. 2895. As off-premises commercial and noncommercial speech are treated equally, the Towns have not, as San Diego did, inverted the First Amendment standards. The Babylon off-premises advertising regulation provides:

> No sign shall advertise, refer to or call attention to any activity, business product or service not performed or connected with the property or building on which it is located.

BABYLON, N.Y. CODE art. XIX, § 213-255 (D)(5). It is quite clear that this section does not prefer commercial speech. The language of the statute indicates a general prohibition on off-premises copy, regardless of character. In *Metromedia,* the plurality indicated that a general off-premises restriction could be acceptable:

> As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. *There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech.*

Metromedia, 453 U.S. at 513, 101 S.Ct. at 2895 (emphasis added). Such a conclusion is also contained in the dissenting opinions of Chief Justice Burger, Justice Stevens, and then Justice, now Chief Justice, Rehnquist.

An aggregation of the interests of private individuals and commercial merchants in the ascertainment of the location and availability of regional commercial and noncommercial establishments, and the interests of the towns and private individuals in the precipitation of a smooth and controlled flow of vehicular and pedestrian traffic (a total ban on detached signs in developed commercial areas, especially those containing shopping centers, would assuredly result in widespread confusion, would augment already substantial vehicular congestion, and would subvert the governmental interest in traffic safety) underlie the distinction.

The ordinances, including the off-premises copy restriction, are plainly aimed at regulating the secondary aspects of the communicative medium. The prohibition of off-premises signs merely reflects a legislative determination that the governmental interests in esthetics and traffic safety, which underpins the sign codes, must bow to the combination of the above noted interests. Since the exception carved out by the

legislature does not prefer commercial speech or otherwise choose the subjects for public discourse, the regulation should be sustained.

This Court has not directly confronted the issue, yet the issue is inexorably intertwined in the regulation of billboards and outdoor signs. Further, in response to *Metromedia*, there assuredly remains a proliferation of ordinances containing such a distinction. A statement by this Court on that issue would not merely settle the impact of *Metromedia*, but would provide a firm cohesive statement cogently delineating the fundamental parameters of billboards and outdoor sign regulations.

CONCLUSION

In accordance with the reasons expressed above, the petition for Writ of Certiorari to the Second Circuit Court of Appeals should be granted.

Dated: Lindenhurst, New York
June, 1990

Respectfully Submitted:

STANLEY G. MARTIN, ESQ.
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Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 432, 433, 246, 247, 248—August Term, 1989

(Argued October 23, 1989 Decided April 3, 1990)

Docket Nos. 89-7144, -7192, -7248, -7480, -7506

NATIONAL ADVERTISING COMPANY,

Plaintiff-Appellee-Cross-Appellant,

—v.—

TOWN OF BABYLON, INCORPORATED VILLAGE OF LINDENHURST, TOWN OF BROOKHAVEN, INCORPORATED VILLAGE OF FREEPORT, TOWN OF OYSTER BAY, TOWN OF ISLIP AND TOWN OF HEMPSTEAD,

Defendants,

TOWN OF OYSTER BAY, TOWN OF BABYLON, TOWN OF HEMPSTEAD, TOWN OF ISLIP,

Defendants-Appellants-Cross-Appellees,

—and—

INCORPORATED VILLAGE OF FREEPORT,

Defendant-Cross-Appellee.

Before:

OAKES, *Chief Judge*,
KEARSE and ALTIMARI, *Circuit Judges*.

Appeals from a judgment of the United States District Court for the Eastern District of New York, Leonard D. Wexler, *Judge*, *see* 703 F. Supp. 228 (E.D.N.Y. 1989), striking down the sign ordinances of the Towns of Babylon, Hempstead and Oyster Bay in their entirety and striking down portions of the sign ordinances of the Town of Islip and the Incorporated Village of Freeport.

The appeal of Oyster Bay is dismissed; the judgment of the district court is affirmed in part and reversed in part.

(ROBERT W. SCHMIDT, Oyster Bay Town Attorney, Kenneth A. Davis, Oyster Bay, NY, of counsel), *for Defendant-Appellant-Cross-Appellee Town of Oyster Bay*.

(THOMAS F. WHALEN, Babylon Town Attorney, Neil Tiger, Lindenhurst, NY, of counsel), *for Defendant-Appellant-Cross-Appellee Town of Babylon*.

LAWRENCE L. FRIEDMAN, Hempstead, NY (Ronald J. Levinson, Hempstead Town Attorney, of counsel), *for Defendant-*

Appellant-Cross-Appellee Town of Hempstead.

LAWRENCE DONOHUE, Islip, NY (Robert J. Cimino, Islip Town Attorney, of counsel), *for Defendant-Appellant-Cross-Appellee Town of Islip.*

WILLIAM F. GLACKEN, Freeport, NY, *for Defendant-Cross-Appellee Incorporated Village of Freeport.*

MYRON D. COHEN, New York, NY (Christopher M. Mason, Michael R. Shebelskie, Hunton & Williams, of counsel), *for Plaintiff-Appellee-Cross-Appellant.*

OAKES, *Chief Judge*:

These appeals and cross-appeal, involving five municipal billboard ordinances, are from a judgment of the United States District Court for the Eastern District of New York, Leonard D. Wexler, Judge, reported at 703 F. Supp. 228 (E.D.N.Y. 1989). The Towns of Babylon, Hempstead and Oyster Bay appeal from Judge Wexler's decision insofar as it struck down their ordinances in their entirety as unconstitutional restrictions on commercial speech. The Town of Islip appeals from the decision insofar as it struck down part of its ordinance as an unconstitutional restriction on noncommercial speech. The National Advertising Company ("National") cross-appeals from the decision insofar as it severed unconstitutional provisions of the ordinances of Islip and the Incorporated Village of Freeport and saved the remain-

der. We affirm the judgment to the extent that it struck down the ordinances of Babylon and Hempstead; we reverse the judgment to the extent that it upheld portions of the ordinances of Freeport and Islip; and we dismiss the appeal of Oyster Bay.

BACKGROUND

National, a subsidiary of Minnesota Mining and Manufacturing Company, is engaged in the business of outdoor advertising and commands a market share of approximately twenty percent of the billion-dollar billboard industry in the United States. It leases real estate upon which it erects and maintains billboards and in turn leases space on the billboards to persons or entities wishing to communicate messages to the viewing public. Ninety-eight percent of the billboards National leases are commercial in nature, while the remaining two percent convey noncommercial messages.

National has obtained leasehold interests on sites on which it intends to erect billboards in each of the Long Island municipalities that are parties to this action. Each of those sites is in an area zoned for commercial or industrial use. The proposed billboards would carry both commercial and noncommercial messages that would be unrelated to the products sold or activities conducted at the locations; in other words, the signs would contain off-premises, as opposed to on-premises, advertising.

In analyzing the constitutionality of the ordinances, the district court first applied the four-part test for determining the validity of governmental regulations on commercial speech that was set forth in *Central Hudson*

Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 563-66 (1980), and later summarized in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion):

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

703 F. Supp. at 233 (quoting *Metromedia*). After finding that there is no suggestion that the advertising for which National seeks constitutional protection involves unlawful activity or is misleading, *see id.* at 234, the district court found that the Babylon, Hempstead and Oyster Bay sign ordinances fail to satisfy the second element of the test in that there is "a complete absence of any stated purpose to support their respective bans on offsite commercial advertising." *Id.* at 235. In addition, those towns "failed to offer any evidence as to the objectives that might underlie the ordinances." *Id.* Accordingly, the court struck down their sign ordinances. By contrast, the court noted that the Freeport and Islip ordinances properly cite as their goals the enhancement of aesthetics and the improvement of traffic safety, *cf. Metromedia*, 453 U.S. at 507-08 ("traffic safety and the appearance of the city . . . are substantial governmental goals"), and found that those ordinances satisfy all the elements of the *Central Hudson* test. *See* 703 F. Supp. at 236.

Turning to the ordinances' impact on noncommercial speech, the court noted that the *Metromedia* plurality had held that an ordinance cannot pass constitutional muster if it favors any type of commercial speech over noncommercial speech. *See id.* at 236-37 (citing *Metromedia*, 453 U.S. at 513). The district court found that, contrary to that requirement, the Freeport and Islip ordinances effectively limit the content of a sign to a business's name and basic information concerning the nature of its business.[1] For instance, as Islip has conceded in its reply brief to this court, under its ordinance " 'Joe's Famous Pizza' . . . could not install a sign say[ing] 'Abortion is Murder.' " The district court concluded that the Freeport and Islip ordinances unconstitutionally prohibit noncommercial speech. *See* 703 F. Supp. at 238.

The district court also found that certain exceptions to Islip's general ban on signs impermissibly prefer commercial over noncommercial speech, such as a provision permitting signs indicating that real property is for sale or lease, and that other exceptions impermissibly favor certain forms of noncommercial speech, such as temporary political signs and signs "identifying a grand opening, parade, festival, fund drive or similar occasion," over other forms of noncommercial speech based on

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1 The Freeport ordinance permits only "accessory signs" to be displayed. Freeport, N.Y., Code art. XXI § 210-209(A). An accessory sign is defined as "[a]ny sign related to a residence, business or profession conducted, or to a commodity or service sold or offered, lawfully existing upon the premises where such sign is located." *Id.* at § 210-204.

The Islip ordinance states: "Permitted signs may only identify the person, establishment, the principle [sic] product and/or service available on the premises which contains [sic] the sign." Islip, N.Y., Code art. XXIX § 68-395(A).

their content. *See id.* at 238-39 (citing Islip, N.Y., Code art. XXIX § 68-395(B)(6), (13) & (16)). The court found that the Freeport ordinance contains a similar impermissible exception for "for sale" signs. *See id.* at 238 (citing Freeport, N.Y., Code art. XXI § 210-208(J)).

Although the court found that aspects of the Freeport and Islip ordinances violate First Amendment guarantees, it stopped short of striking down the ordinances in their entirety. Instead, the district court enjoined Freeport and Islip from enforcing their ordinances so as to disadvantage noncommercial speech as against commercial speech, or to disadvantage certain forms of noncommercial speech as against other forms of noncommercial speech. *See id.* at 240. The effect of the district court's remedy was to sever the unconstitutional portions of the ordinances and to leave the remainder of the ordinances intact. In so doing, the district court restructured the Freeport and Islip ordinances along the lines of ordinances found constitutional by the Fourth Circuit in *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269, 1271-72 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987), and *Georgia Outdoor Advertising v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987), both of which upheld under *Metromedia* municipal ordinances that allowed any authorized sign "to contain non-commercial copy in lieu of any other copy."[2]

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2 The district court also noted that all the municipalities were free to amend their ordinances in an effort to satisfy constitutional requirements. *See* 703 F. Supp. at 235, 240. Although several have informed this court that they have since done so, that fact does not render this appeal moot. As the Supreme Court has observed, a voluntary repeal of a constitutionally repugnant law does not necessarily moot challenges to it, because without a judicial determination of constitutional-

DISCUSSION

In the first place, we dismiss Oyster Bay's appeal because its notice of appeal was filed while Hempstead's motion to vacate the district court's judgment pursuant to Federal Rule of Civil Procedure 59 was pending in the district court. Under Federal Rule of Appellate Procedure 4(a)(4), a notice of appeal filed during the pendency of a Rule 59 motion is ineffective. *See Acosta v. Louisiana Dep't of Health and Human Resources*, 478 U.S. 251 (1986) (per curiam). Because Oyster Bay did not file a proper notice of appeal after the district court denied the Rule 59 motion, it did not submit effective notice of appeal under Federal Rule of Appellate Procedure 4(a)(1).

As to a preliminary issue raised by the remaining appellants, we have no doubt that the district court was correct in holding that, because of its commercial interest in the speech appellants seek to restrict, National has standing to challenge the ordinances, just as Metromedia had standing in its lawsuit against San Diego. *See Metromedia*, 453 U.S. at 504 & n.11. Similarly, National was not required to exhaust administrative remedies since it challenged the ordinances as facially invalid. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) (" 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality,

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ity the particular governing body remains free to reinstitute the law at a later date. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 & n.10 (1982). In addition, this appeal is not moot because National might have secured some vested rights under state law in the interim.

because he has not yielded to its demands.' ") (citation omitted).

Appeals

Appellants argue that a municipality may ban off-premises commercial billboard advertising and may discriminate between off-premises and on-premises commercial advertising. They cite *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989), for the proposition that *Metromedia* upheld San Diego's complete ban of off-premises billboard advertising without any inquiry as to whether any less restrictive measure would suffice. They also refer us to *Raleigh*, *supra*, and *Waynesville*, *supra*, as support for an outright ban on off-premises advertising. We have difficulty reading these cases to support the propositions claimed by the appellants. To us, this case is really quite simple. Appellants' challenged ordinances are unconstitutional because they fail to follow basic constitutional dictates concerning a municipality's ability to restrict speech.

A. Babylon and Hempstead

It is a well-established rule that where legislation restricts speech, even commercial speech, the party seeking to uphold the restriction carries the burden of justifying it. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). The ordinances of Babylon and Hempstead impermissibly restrain commercial speech because they contain no statement of a substantial governmental interest and the towns offered no extrinsic evidence of such an interest.

Even though one might assume that the towns were interested in traffic safety and aesthetics, the ordinances include no such statement of purpose. True, the preamble to another part of the Babylon zoning code states that the code generally was adopted for the promotion of health, safety, morals, comfort, convenience and the general welfare, and a subsection of the sign ordinance provides that certain exceptions to the ordinance may take aesthetics into account. *See* Babylon, N.Y., Code §§ 213-2 & -254. In Hempstead, one prohibition on sign placements forbids the obstruction of traffic and the creation of a hazard to the health and welfare of the general public, and a provision for variances explicitly requires consideration of aesthetics, light, air and the health and welfare of the public. *See* Hempstead, N.Y., Code §§ 246(B) & 242(B)(4). However, these provisions do not provide the rationale for the enactment of the sign ordinances themselves.

We have been unable to find any case where a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech. *See, e.g., Bell v. Township of Stafford*, 110 N.J. 384, 398, 541 A.2d 692, 700 (1988) ("In view of Stafford's failure to justify the passage of such a broad and encompassing ordinance that substantially curtails freedom of speech and expression, we are constrained to declare it facially unconstitutional."). At most, courts have taken judicial notice of a common-sense linkage between a stated governmental interest and a restriction in order to assess whether the third part of the *Central Hudson* test—that a restriction directly advance the governmental interest asserted—has been satisfied. *See, e.g., Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) ("the decision on whether a regula-

tion of commercial speech directly advances the state's interest . . . is an exercise of constitutional adjudication wherein appellate courts play a special role"), *cert. denied*, 467 U.S. 1259 (1984).

While acknowledging that substantial governmental interests exist in the promotion of aesthetics and traffic safety, the Eleventh Circuit in *Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), declined to impute an interest in aesthetics to a regulation on portable signs that stated that its purpose was "to safeguard life, public health, property and welfare." *See* 674 F.2d at 1381. The court held that with such an all-inclusive statement of purpose it was forced to examine the record for evidence of the interest underlying the measure, and refused to accept counsel's "mere incantation of aesthetics as a proper state purpose." *Id.* The court noted that "[s]uch broad, all encompassing statements tend to frustrate judicial inquiry into the real purposes of a governmental entity in instituting a restriction on protected activity." *Id.* Although the Eleventh Circuit accepted the traffic safety rationale, *id.*, it based that finding on a narrow reading of the ordinance's own statement of purpose as well as on the portable sign regulation's obvious aim of promoting traffic safety, factors that are not present here.

Because the Babylon and Hempstead sign ordinances do not identify the particular governmental interests sought to be advanced and the towns failed to introduce any extrinsic evidence of the interests underlying the ordinances, we agree with the district court's finding that the ordinances are unconstitutional.

B. Islip

Although the district court found that the ordinances of all appellants unconstitutionally discriminate against noncommercial speech, we consider in this context only Islip's ordinance. Because we strike down the Babylon and Hempstead ordinances as unconstitutional restrictions on commercial speech, we need not consider their effect upon noncommercial speech.[3]

As to Islip's ordinance, we agree with the district court that it is defective because it impermissibly discriminates against noncommercial speech in favor of commercial speech. As the *Metromedia* plurality held:

> Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

453 U.S. at 513. After *Metromedia* struck down San Diego's ordinance as granting more protection to commercial than noncommercial speech, municipalities responded by adding provisions to their sign ordinances to overcome this defect by permitting noncommercial messages wherever commercial messages were allowed. *See, e.g., Waynesville*, 833 F.2d at 46 (" 'Any sign

3 As the district court noted, its discussion of the effect of those ordinances on noncommercial speech was dicta. *See* 703 F. Supp. at 236 n.5. Nonetheless, Babylon and Hempstead are advised to give strong consideration to the district court's reasoning, as well as to our ruling today regarding the constitutionality of the Islip ordinance's restrictions upon noncommercial speech, if they choose to redraft their ordinances.

authorized in this ordinance is allowed to contain non-commercial copy in lieu of other copy.' "); *Raleigh*, 792 F.2d at 1271 (virtually identical provision). Not so Islip. Although it would have been a simple matter to draft such a provision, Islip's ordinance has none. Accordingly, we agree with the district court that Islip's sign ordinance, like that of San Diego a decade ago, violates the First Amendment.

The district court properly followed *Metromedia* in concluding that the exceptions to the ban for temporary political signs and for signs identifying a grand opening, parade, festival, fund drive or other similar occasion impermissibly discriminate between types of noncommercial speech based on content. *See Metromedia*, 453 U.S. at 515 ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse . . ."). We find, however, that the town properly provided for an exemption from the ban for signs indicating that real property is for sale or lease. Rather than being an unconstitutional content-based preference for commercial speech over noncommercial speech, that exemption is appropriate following the Supreme Court's decision in *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), which struck down on First Amendment grounds content-based restrictions upon the posting of "for sale" or "sold" signs.

Cross-Appeal

In the cross-appeal National challenges the fact that the district court struck down portions of the Freeport and Islip ordinances that it found unconstitutional and, in spite of the fact that they did not contain severability

clauses, saved the remainder. The court accomplished this by structuring its injunctive relief so that the ordinances effectively would contain provisions like those found in *Raleigh*, *supra*, and *Waynesville*, *supra*, permitting noncommercial copy to appear on signs wherever commercial copy is allowed. The district court explained this decision by stating that it made "an effort narrowly to tailor constitutionally based injunctive relief." 703 F. Supp. at 240. Finding the ordinances to be nonseverable, we strike them down in their entirety.

Since the overbreadth challenge was successful, the Freeport and Islip ordinances are invalid in all their applications. *See Board of Trustees v. Fox*, 109 S. Ct. at 3036. In the absence of severability clauses,[4] the burden is on the towns to show that the unconstitutional provisions are severable. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). The critical issue is whether the legislation would have been enacted if it had not included the unconstitutional provisions. *See United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968); *Carter Coal*, 298 U.S. at 312-13. Islip failed to address this issue at all, and Freeport's assertion that it *can* enforce its ordinance in a constitutional manner is not relevant to the issue of whether it would have enacted the ordinance in the manner proposed by the district court. Inasmuch as Freeport itself recognizes that its ordinance "is a comprehensive regulatory scheme intended to regulate many different forms of commercial and noncommercial speech," we find the constitutional and unconstitutional provisions to be inextricably interwoven, lending further support to the presumption of nonseverability. *See Carter Coal*, 298 U.S. at 313. The

4 In spite of the 180-degree turn Freeport took at oral argument, we find that its sign ordinance does not contain a severability provision.

district court had to rewrite the Freeport and Islip ordinances substantially in order to save them, a practice which is decidedly disfavored. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764-65 (1986).[5]

Judgment in accordance with opinion with costs to appellee.

5 Following the Supreme Court's remand in *Metromedia*, the California Supreme Court reached the same result we reach here. Faced with a San Diego ordinance that had been declared unconstitutional for virtually the same reasons as the Freeport and Islip ordinances, the court held that the unconstitutional provisions were not severable in spite of the fact that the San Diego ordinance, unlike the Freeport and Islip ordinances, contained a severability clause. *See Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 649 P.2d 902, 185 Cal. Rptr. 260 (1982).

EXHIBIT B
703 FEDERAL SUPPLEMENT

703 FEDERAL SUPPLEMENT 228
(E.D. N.Y., 1989)

NATIONAL ADVERTISING COMPANY,
Plaintiff,

v.

TOWN OF BABYLON, et al.,
Defendants.

No. CV 88-0105.

United States District Court, E.D., New York.

Jan. 4, 1989.

Owner of advertising company brought action against towns and villages, alleging restrictive signing ordinances violated the First Amendment, and seeking to permanently enjoin towns and villages from enforcing the challenged ordinances. The District Court, Wexler, J., held that: (1) other advertising company had standing to challenge the ordinances as violative of the First Amendment, under overbreadth doctrine and through third-party standing; (2) to extent ordinances did not state purpose supporting their bans on off-site commercial advertising, the ordinances were unconstitutional, but to extent supportive purposes involving aesthetics and traffic safety were stated, the bans of off-site commercial advertising were constitutional; (3) ordinance preferences for

on-premises commercial signs over noncommercial speech violated First Amendment, as did exceptions favoring certain types of noncommercial speech over other types of noncommercial speech; and (4) injunctive relief would be limited to precluding towns and villages from enforcing ordinances in manner disadvantaging any type of noncommercial speech based on constitutionally offensive language favoring commercial speech above noncommercial speech and favoring subject matter of certain noncommercial speech above other noncommercial speech.

Injunction granted.

Hunton & Williams, by Franklin H. Stone, New York City, for plaintiff.

Thomas F. Whalen, Babylon Town Atty., Lindenhurst, N.Y., for defendant Town of Babylon.

Guy W. Germano, Islip Town Atty. by Lawrence Donohue, Islip, N.Y., for defendant Town of Islip.

Robert Schmidt, Oyster Bay Town Atty., Oyster Bay, N.Y., for defendant Town of Oyster Bay.

W. Kenneth Chave, Hempstead Town Atty. by Daniel F. McCarthy, Hempstead, N.Y., for defendant Town of Hempstead.

William F. Glacken, Freeport, N.Y., for defendant Inc. Village of Freeport.

Edward Young, West Babylon, N.Y., for defendant Inc. Village of Lindenhurst.

WEXLER, District Judge.

BACKGROUND

Plaintiff National Advertising Company ("National"), a subsidiary of Minnesota Mining and Manufacturing Company ("3M"), a Delaware corporation, brings this action pursuant to 42 U.S.C. § 1983 against the Town of Babylon ("Babylon"), the Village of Freeport ("Freeport"), the Town of Hempstead ("Hempstead"), the Town of Islip ("Islip"), the Village of Lindenhurst ("Lindenhurst"), and the Town of Oyster Bay ("Oyster Bay")[1] claiming that various sign ordinances of the defendant towns and villages violate plaintiff's right to free speech under the First and Fourteenth Amendments to the United States Constitution. Plaintiff originally moved for the entry of a preliminary injunction barring defendants from enforcing their ordinances during the pendency of this case. After conducting a hearing on plaintiff's motion, this Court gave the parties notice that, pursuant to Fed.R.Civ.P. 56, the Court would treat Plaintiff's preliminary injunction motion as a motion for summary judgment seeking permanently to enjoin defendants from enforcing the challenged ordinances.

National is a company engaged in the business of outdoor advertising. In order to conduct its business, National leases real estate upon which it erects and maintains outdoor sign structures commonly known as billboards. National in turn leases space on these billboards to persons or entities wishing to communicate messages to the viewing public. National is the second largest outdoor advertising company in the country with roughly a twenty percent market share of a billion dollar industry. Statistics indicate that approximately ninety-eight percent of the billboards National leases contain advertising

[1] When National first commenced this action it also named as defendants the Town of Brookhaven and the Village of Amityville but subsequently withdrew its claims against these defendants.

displays of a commercial nature, while the remaining two percent convey non-commercial messages.

Within each of the defendant towns and villages, National has obtained leasehold interests in areas zoned for commercial or industrial use. National wishes to erect on these properties billboards which will carry both commercial and non-commercial messages that are unrelated to the products sold or activities conducted at these locations. National asserts that the defendants' ordinances prohibit it from erecting such signs. Furthermore, National contends that, since the ordinances favor commercial speech over non-commercial speech, they are facially unconstitutional in light of the Supreme Court's ruling in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) and, thus, may not be enforced so as to restrict plaintiff from erecting and maintaining its signs.

JURISDICTIONAL CONCERNS

Several of the defendant towns and villages raise one or more challenges to plaintiff's ability to pursue this action. This Court finds all of defendants' contentions in this regard to be completely without merit.

[1] First, certain defendants argue that plaintiff lacks standing to challenge the ordinances at issue because it is not plaintiff's own speech that is allegedly being abridged and because only two percent of plaintiff's business is derived from the expression of non-commercial messages. The Supreme Court's plurality opinion in *Metromedia* addressed the issue of standing and rejected the same position defendants now urge this Court to adopt. *Metromedia*, 453 U.S. at 504, 101

S.Ct. at 2890.

In *Metromedia v. City of San Diego*, 26 Cal.3d 848, 869 n. 14, 164 Cal.Rptr. 510, 522 n. 14, 610 P.2d 407, 419 n. 14 (1980), *rev'd.*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.E.d.2d 800 (1981), the California Supreme Court found the plaintiff, an outdoor advertising business, to be without standing to challenge San Diego's sign ordinance. In reversing this decision, the United States Supreme Court noted that, although the vast majority of plaintiff's signs were leased for the purpose of displaying commercial messages, plaintiff had standing to bring the suit pursuant to the overbreadth doctrine because its signs were also used to carry a host of non-commercial messages. The plurality opinion in *Metromedia* stated:

> We have held that the overbreadth doctrine, under which a party whose own activities are unprotected may challenge a statute by showing that is substantially abridges the First Amendment rights of parties not before the court, will not be applied in cases involving "commercial speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 [, 97 S.Ct. 2691, 2707, 58 L.Ed.2d 810] (1977). However, we have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others.

453 U.S. at 504 n. 11, 101 S.Ct. at 2891 n. 11. Therefore, National's standing is not impaired by the fact that it has a commercial motive for asserting the constitutional rights of others to engage in non-commercial communication or that displays of noncommercial messages comprise only two percent of its business.

[2] In addition to satisfying the standing requirement under the overbreadth doctrine, plaintiff derives the ability to sue from the principle of third party standing. Clearly, National meets the threshhold test of alleging an "injury in fact" sufficient to give rise to a case or controversy. *See Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct., 691, 703, 7 L.Ed.2d 663 (1962). The remaining question, then, is whether National may assert the right of a third party adversely affected by the ordinances. The Court answers this question affirmatively. In *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), a plurality of the Supreme Court recognized the right of male doctors to seek injunctive and declaratory relief from a Missouri statute denying Medicaid benefits to patients who obtained abortions that were not medically required. In reaching its decision, the plurality examined the relationship between the litigant and those whose rights the litigant sought to assert on the theory that "[i]f the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." 428 U.S. at 114-15, 96 S.Ct. at 2874. The Court further concluded that in many situations the relationship may be such that the litigant is just as effective an advocate of the right being asserted as is the party in whom the right is vested. 428 U.S. at 115, 96 S.Ct.. at 2874. The Supreme Court reached a similar result in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), *reh'g denied*, 429 U.S. 1124, 97 S.Ct. 1161, 51 L.Ed.2d 574 (1977), upholding the standing of a plaintiff in the retail beer industry to assert the rights of male patrons to equal protection against a law prohibiting the sale of beer to males under age 21 and females under age 18.

In the instant case, the right of a person or entity wishing to display a non-commercial message on an outdoor sign structure is inextricably tied to the activity of the lessor of such space. Just as was true of the doctor in *Singleton* and the beer vendor in *Craig*, National, or a like company, offers a service that is essential to that third party's exercise of its constitutional right. Also, National would, in all likelihood, be as vigorous a proponent of the right being asserted as the right holder would be. Furthermore, defendants have failed to bring to this Court's attention any instance where a court faced with a First Amendment challenge to a sign ordinance by a plaintiff in the outdoor advertising business has dismissed the action for lack of standing. Therefore, this Court holds that National has standing to maintain its action.

[3] This Court similarly rejects the position of those defendants that contend that plaintiff is not entitled to the relief sought due to its failure to exhaust its administrative remedies. These defendants argue that as a prerequisite to bringing this action National must have first sought and been denied a permit for the signs it desires to erect. This argument, however, ignores the fact that plaintiff's challenge to the various ordinances is that they are facially unconstitutional, not that they have been unconstitutionally applied. A plaintiff is not required to "test" a statute which is unconstitutional on its face. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yet yielded to its demands." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) *(quoting Jones v. Opelika*, 316 U.S. 584, 602, 62 S.Ct. 1231, 1242, 86 L.Ed. 1691 (1942) (Stone, C.J. dissenting), *adopted per curiam on reh'g*,

319 U.S. 103, 104, 63 S.Ct. 890, 87 L.Ed. 1290 (1943)). *See also Natco Theatres, Inc. v. Ratner,* 463 F.Supp. 1124, 1126 (S.D.N.Y.1979). In any event, the issue of exhaustion, like that of ripeness, "is now very much a matter of common sense." *Seafarers Inter. Union of North America, AFL-CIO v. U.S. Coast Guard,* 736 F.2d 19, 26 (2d. Cir.1984). Common sense dictates that National need not first go through the motions of seeking permits for the erections of signs that, as is discussed below, the clear language of each of the defendants' ordinances declares must be denied.

[4] Finally, several defendants maintain that The Federal Highway Beautification Act, 23 U.S.C. § 131(a), acts as a prohibition on plaintiff's request for injunctive relief. The Court is unpersuaded by defendants' position. While the Court takes notice that this Act is designed to encourage states to control construction of billboards along interstate highways, the Court also recognizes that the Act was not intended as a vehicle under the auspices of which municipalities may abridge First Amendment rights. It is hardly inconceivable that a regulation may further the purpose of a federal statute yet simultaneously violate the requirements of the constitution. Defendants have pointed to nothing in The Federal Highway Beautification Act that would give this Court pause to reach the question of whether the ordinances presently at issue are constitutional.

IMPACT ON COMMERCIAL SPEECH

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the Supreme Court for the first time

expressly recognized that commercial speech is entitled to constitutional protection. The Court held that, although commercial speech should not be given the same degree of protection as that which is accorded forms of non-commercial speech, the mere fact that a speaker's "interest is a purely economic ... hardly disqualifies him from First Amendment protection". 425 U.S. at 762, 771-72 n. 24, 96 S.Ct. at 1826, 1830-31 n. 24.

Thereafter, in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court reaffirmed its holding in *Virginia State Bd.* and established a four-part test for determining the validity of governmental regulations restricting commercial speech. This test was further refined in *Metromedia* as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507, 101 S.Ct. at 2892 (citing *Central Hudson*, 447 U.S. at 563-66, 100 S.Ct. at 2350-51).

In *Metromedia*, the Court held that a city ordinance which allowed on-premise commercial advertising[2] but prohibited most other forms of outdoor commercial advertising displays satisfied the requirements of the *Central Hudson* test. 453 U.S. at 513, 101 S.Ct. at 2895. As to the first criterion of *Central Hudson*, the Court found that the form of commercial speech being regulated in *Metromedia* was lawful and not misleading, and thus merited First Amendment protection. *Metromedia*, 453 U.S. at 507, 101 S.Ct. at 2892. Next, the Court determined that the city's asserted interest in restricting commercial advertising—the amelioration of alleged traffic hazards caused by distracting sign displays and improvement and preservation of the city's physical appearance—was substantial and, therefore, satisfied the second requirement of the four-part test. 453 U.S. at 507–08, 101 S.Ct. at 2892–93. The Court next turned to the fourth element of the *Central Hudson* test and concluded that the ordinance was not broader than necessary to achieve the city's stated goals, expressing its view that "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." 453 U.S. at 508, 101 S.Ct. at 2893.

The Court regarded as most troublesome the third criterion

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[2] The ordinance at issue in *Metromedia* permitted only signs "which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising good manufactured or produced or services rendered on the premises upon which signs are placed." *Metromedia*, 453 U.S. at 493 n. 1, 101 S.Ct. at 2885 n. 1 (quoting San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972).

of its *Central Hudson* analysis, *i.e.*, the question of whether the ordinance directly advanced the city's asserted interests of safety and aesthetics, 453 U.S. at 508, 101 S.Ct. at 2893. As to the city's asserted goal of promoting safety, the Court simply deferred to "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety" and that limitations placed upon their erection do directly contribute to safer roadways. 453 U.S. at 509, 101 S.Ct. at 2893. Likewise, with regard to the city's aesthetic interests, the Court stated: "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm' ... The judgment involved here [by the city] is not so unusual as to raise suspicions in itself [of an ulterior motive to suppress speech]." 453 U.S. at 510, 101 S.Ct. at 2893-94.

Before ending its analysis, the Court addressed the argument that the city, by permitting any form of commercial or non-commercial advertising, had denigrated its asserted bases for the ordinance—traffic safety and aesthetics—and diminished its own case. 453 U.S. at 510-11, 101 S.Ct. at 2894. The Court rejected this contention, noting that the underinclusive nature of the ordinance in no way altered the fact that the prohibition of offsite advertising directly advanced the city's stated regulatory goals. 453 U.S. at 511, 101 S.Ct. at 2894. In addition, the Court recognized the possiblity that the city might have understandably believed that offsite advertising presented "a more acute problem than [did] onsite advertising." *Id.* Finally, the Court accepted the city's conclusion that the public and commercial enterprises themselves have a stronger interest in the identification of a place of business and the products and services available there than in the use

of available space for the promotion of business enterprises located elsewhere. 453 U.S. at 512, 101 S.Ct. at 2894–95.

In considering the constitutionality of the ordinances with which plaintiff takes issue vis-a-vis their effect on commercial speech, this Court must apply the four-part *Central Hudson* test to the facts presented. In doing so, it quickly becomes apparent that the Supreme Court's decision in *Metromedia* largely governs such an analysis, as the legal issues and factual situation which that case presented closely parallel those engendered by the ordinances this Court must now scrutinize.

With regard to *Central Hudson's* threshhold factor, just as was true in *Metromedia,* there as been no suggestion in the instant case that the form of commercial advertising for which plaintiff seeks constitutional protection involves unlawful activity or is in any way misleading. *See Metromedia,* 453 U.S. at 507, 101 S.Ct. at 2892. Plaintiff's speech interest is therefore entitled to First Amendment protection and only may be circumscribed if defendants can satisfy each of the remaining three criteria of *Central Hudson. Id.*

[5] As to the second element of *Central Hudson,* defendants Babylon, Hempstead, Lindenhurst, and Oyster Bay have failed to satisfy constitutional requirements. The second *Central Hudson* criterion dictates that there must be a substantial governmental interest asserted to support the restriction on constitutionally protected commercial speech. 447 U.S. at 566, 100 S.Ct. at 2351. A mere cursory examination of each of these defendants' ordinances reveals a complete absence of any stated purpose to support their respective bans on offsite commercial advertising.

Moreover, at the hearing that the Court held on plaintiff's motion for a preliminary injunction, these defendants failed to

offer any evidence as to the objectives that might underlie the ordinances they had enacted. Similarly, after the Court gave the parties notice that it was converting the preliminary injunction motion into a motion for summary judgment and allowed the parties to submit additional material in connection with the converted motion, these defendants did not offer any evidence, by way of affidavit or otherwise, that would indicate the motives that lead to the promulgation of the respective ordinances. Certain of these defendants stated in briefs filed in opposition to plaintiff's initial preliminary injunction motion that the purpose of their ordinances is to promote safety and aesthetics. Mere assertions in a memorandum of law, otherwise unsubstantiated in the record, are, however, insufficient to satisfy the second requisite element of *Central Hudson* and overcome summary judgment. See *Weiss v. Feigenbaum,* 558 F.Supp. 265, 269 n. 1 (E.D.N.Y. 1982); *United States v. Malkin,* 317 F.Supp. 612, 614 n. 6 (E.D.N.Y. 1970).

In the absence of any evidence demonstrating the purposes intended to be served by the ordinances these defendants have enacted, this Court is unable to assess whether the ordinances do in fact "implement a substantial governmental interest," *Metromedia,* 453 U.S. at 507, 101 S.Ct. at 2892, and therefore is constrained to hold that the ordinances fail to pass constitutional muster. *See Dills v. City of Marietta,* 674 F.2d 1377, 1381 (5th Cir. 1982), *cert. denied,* 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983); *Rhodes v. Gwinnett County,* 557 F.Supp. 30, 32-33 (N.D.Ga. 1982). Of course, Babylon, Hempstead, Lindenhurst, and Oyster Bay are free to amend their respective ordinances in an effort to satisfy constitutional requirements.

[6] The ordinances of defendants Freeport and Islip, on the

other hand, do delineate the purposes for which their ordinances were enacted. The Freeport ordinance, for example, lists the enhancement of Freeport's "physical appearance and environment" and the reduction of traffic accidents as two of its goals.[3] Likewise, Islip's ordinance lists among its stated purposes the improvement of "the aesthetic environment of the town" and the reduction of "motorist distraction."[4] The Supreme Court in *Metromedia* found that these goals of aesthetics and safety are unequivocally substantial governmental objectives and thus satisfy the second criterion of the *Central Hudson* test. *See* 453 U.S. at 507-08, 101 S.Ct. at 2892-93.

As to the third element of *Central Hudson,* that the regula-

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[3] The Freeport Code states in pertinent part:

The purpose of this Article is to regulate existing and proposed signs in order to:

A. Protect property values.

B. Create a more attractive economic business climate.

C. Enhance and protect Freeport's physical appearance and environment.

D. Preserve the scenic and natural beauty of the village.

E. Provide a more enjoyable and pleasing community.

F. Reduce sign or advertising distractions and obstructions that may contribute to traffic accidents.

G. Reduce hazards that may be caused by signs overhanging or projecting over public rights-of-way.

FREEPORT, N.Y., CODE art XXI § 210-202.

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[4] The Islip Code states in pertinent part:

This Article is intended to control outdoor signs of all types and in all zoning districts by regulating size, location, quantity, quality, content and design to:

A. Protect the safety of the public.

B. Enhance the aesthetic environment of the town.

C. Reduce motorist distraction.

D. Provide for uniform design standards.

E. Encourage excellence in sign design.

F. Improve business identification and sign comprehension.

G. Limit the use of energy in sign design and maintenance.

H. Amortize and replace signs which do not conform to the provisions of this Article.

ISLIP, N.Y., CODE art. XXIX § 68-394.

tion must directly advance the asserted interest, the notion expressed in *Metromedia* that judgments concerning the relationship between billboard advertising and traffic safety are " 'intensely local and specialized' " and should not be disturbed unless shown to be "unreasonable" or "palpably false", 453 U.S. at 509, 101 S.Ct. at 2893 (citing *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 109, 69 S.Ct. 468, 465, 93 L.Ed. 533 (1949)), is equally applicable to the case now before the Court. Plaintiff has offered no evidence to suggest that Freeport and Islip's legislative judgments concerning traffic safety are unreasonable or false. Likewise, as to Freeport and Islip's judgments regarding the connection between outdoor sign advertising and aesthetics, the *Metromedia* Court observed that "billboards by their very nature, wherever located and however constructed, can be perceived as 'aesthetic harm' " and that, in the absence of proof showing that defendants have an ulterior motive to suppress speech, such expression can constitutionally be regulated. 453 U.S. at 510, 101 S.Ct. at 2893–94. Plaintiff in the instant case has not demonstrated any such ulterior motive. Accordingly, the Court finds that Freeport and Islip's respective ordinances directly advance the interests stated therein and thus meet *Central Hudson's* third requirement.

Finally, with respect to the fourth factor in the *Central Hudson* test—namely, that the regulation must not be broader than necessary to achieve its stated objectives—this Court holds that Freeport and Islip's ordinances are reasonable are are not more extensive than is required to sustain their asserted interests. As the Court in *Metromedia* opined, "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the

problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends." 453 U.S. 508, 101 S.Ct. at 2893. Here, defendants' judgments concerning outdoor advertising and its effect on traffic safety and aesthetics are rational and reasonably tailored to achieve their valid purposes.

In conclusion, this Court holds that the portions of the ordinances of defendants Babylon, Hempstead, Lindenhurst, and Oyster Bay that plaintiff has challenged in this action, namely, those requiring that outdoor signage be limited to on-premises advertising, must be struck down as unconstitutional because these defendants have not put before the Court any evidence indicating the purposes underlying these restrictions and thus have failed to satisfy an essential element of the *Central Hudson* test. The ordinances of defendants Freeport and Islip, on the other hand, meet each of the four aspects of the *Central Hudson* test and therefore fulfill constitutional requirements with respect to their effect on commercial speech.

IMPACT ON NON-COMMERCIAL SPEECH

Turning to the ordinances' impact on non-commercial speech[5], this Court notes that, as the *Metromedia* plurality made clear, while the constitutionality of a sign ordinance will not be impaired by its preference for one type of commercial

[5]Although, having found the challenged portions of the ordinances of Babylon, Hempstead, Lindenhurst, and Oyster Bay to be unconstituional on the basis of their effect on commercial speech, the Court is not required to reach the question of whether the ordinances are unconstitutional because of their impact on non-commercial speech, the Court believes that it is prudent to include these ordinances in its discussion of constitutional issues which the regulation of non-commercial signage raises.

speech over another, an ordinance will not pass constitutional muster if it favors any type of commercial speech over non-commercial speech. 453 U.S. at 513, 101 S.Ct. at 2895. *See also Jackson v. City Council of Charlottesville,* 659 F.Supp. 470, 473 (W.D.Va. 1987), *modified on other grounds,* 840 F.2d 10 (4th Cir.1988); *Matthews v. Town of Needham,* 596 F.Supp. 932, 935 (D.C. Mass.1984), *aff'd,* 764 F.2d 58 (1st Cir. 1985). The Supreme Court struck down the portion of San Diego's ordinance which permitted commercial entities to erect and maintain signs advertising the services or goods related to the sign's location but at the same time prohibited entities from communicating through the use of an otherwise identical sign non-commercial messages unconnected to the business being conducted on the premises. The plurality held that, "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Id.*

[7] In addition to the ordinance's infirmity in according greater protection to commercial speech than to traditionally higher valued non-commercial speech, San Diego's ordinance improperly preferred certain types of non-commercial speech over other non-commercial speech. 453 U.S. at 514-15, 101 S.Ct. at 2896. San Diego's prohibition on signs contained exceptions for, among other things, religious symbols, temporary political signs, and signs displaying news items. 453 U.S. at 514, 101 S.Ct. at 2896. The Court held that San Diego could not choose on the basis of content which non-commercial signs would be permitted and which would be disallowed, for " '[t]o allow a government the choice of permissible sub-

jects for public debate would be to allow government control over the search for political truth.' " *Id.* (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 538, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980)). In sum, in order to pass constitutional muster, a sign ordinance, to the extent that it regulates non-commercial speech, may neither regulate such speech more stringently than it does commercial speech nor demonstrate a preference for the subject matter of certain non-commercial speech over other non-commercial speech.

Applying these basic principles to the six ordinances at issue in the present case, this Court finds that each ordinance contains certain provisions which are violative of the First Amendment guarantee of free speech.

[8] The Babylon Code provides that ground signs "shall only be permitted on a plot of ground on which a business or industry is conducted and only as an accessory thereto" and that "[s]uch sign[s] shall only advertise the name of the business conducted on the premises or its trademark, product or service offered." BABYLON, N.Y. CODE art. XIX § 213–253(g)(1) & (2). In addition, the Babylon Code permits signs to "indicate only the name or names of the establishment, occupants, the principal products or services available on the premises and the address." *Id.* at § 213–255(c)(1). Therefore, the only type of ground signs allowed under the Babylon Code are those which advertise a product or service offered by a business or industry located at the premises on which the sign is erected, *i.e.*, on-premise commercial signs. The Babylon Code in this respect closely parallels the portion of the San Diego ordinance struck down by the Supreme

Court in *Metromedia*.[6] Just as was true of San Diego in *Metromedia*, Babylon's preference for on-premises commercial signs inverts the constitutionally mandated hierarchy that elevates non-commercial speech over commercial speech and thus contravenes the rudimentary values of the First Amendment.

Similarly, Freeport's Code contains a provision which reads, in pertinent part, "Only accessory signs shall be permitted. Nonaccessory signs shall be prohibited." FREEPORT, N.Y., CODE art. XXI § 210–209. The Freeport Code defines an accessory sign as "[a]ny sign related to a residence, business or profession conducted, or to a commodity or service sold or offered, lawfully existing upon the premises where such sign is located." *Id.* at § 210–204. A nonaccessory sign is defined as "[a]ny sign unrelated to a business or profession conducted, or to a commodity or service sold or offered, upon the premises where such sign is located." *Id.* In addition, the

[6] The challenged ordinance in *Metromedia* read as follows:

"B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED

"Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall not be permitted. The following signs shall be prohibited:

"1. Any sign identifying a use, facility or service which is not located on the premises.

"2. Any sign identifying a product which is not produced, sold or manufactured on the premises.

"3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.'

Metromedia, 453 U.S. at 493 n. 1, 101 S.Ct. at 2885 n. 1 (quoting San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972).

Freeport Code provides that "[i]nformation displayed on signs shall be limited to the name, address and nature of the business and products available or activity for which the building or premises is used." *Id.* at § 210-211. Therefore, Freeport too permits only signs which relate to a commercial enterprise existing upon the same location as the sign. Thus, to the extent that it favors on-premises commercial speech over non-commercial speech, Freeport's sign ordinance violates the First Amendment.

Each of the remaining ordinances contains similar language which likewise has the effect of unconstitutionally preferring commercial speech to non-commercial speech. Lindenhurst's Code provides that a detached or ground sign "shall advertise only the business conducted on the premises on which it is placed ... " and permits wall signs "advertising only the business conducted in the building...." LINDENHURST, N.Y., CODE § 67-4. Oyster Bay allows wall signs "advertising only the business and produce or services sold within" the building to which the sign is affixed. OYSTER BAY, N.Y., CODE § 128(a). Hempstead's Code provides that "detached signs shall be permitted and shall advertise only the business, products or services provided on the premises" and that "wall signs shall be permitted for each tenant space advertising only the business conducted in each tenant space." HEMPSTEAD, N.Y., CODE art. XXIV § 244(F)(2)(a) & (b). Hempstead's sign ordinance also permits window signs, which it defines, in pertinent part, as a sign "used for advertisement, announcement, or notice, directional matter, company name or tradename which is relative to the business, products or services provided." *Id.* at § 243. Finally, the Islip Code provides that "Permitted signs may only identify the person, establishment, the principle [sic] product and or services available on the

premises which contain the sign." ISLIP, N.Y., CODE art. XXIX § 68–395(A).

[9] In addition to the exception for on-premises commercial speech that each ordinance contains, several of the challenged ordinances also include other exceptions to their general bans on signs. For example, Freeport, Islip, Oyster Bay, Lindenhurst, and Hempstead permit the erection of signs indicating that real property is for sale or lease. FREEPORT, N.Y., CODE art. XXI § 210-208(J); ISLIP, N.Y., CODE art. XXIX § 68-395(B)(6); OYSTER BAY, N.Y., CODE § 126(d); LINDENHURST, N.Y., CODE § 67-3(B); HEMPSTEAD, N.Y., CODE art XXIV § 244(c). Such exceptions are content-based and give preference to commercial real estate signs over signs carrying non-commercial messages. Therefore, to the extent that such provisions afford greater protection to real estate-related speech than to non-commercial speech, they are violative of the First Amendment. Insofar as the defendant towns and villages permit exceptions for specific types of commercial speech, they must provide equal or greater opportunity for the expression of non-commercial speech.

[10, 11] Several of the challenged ordinances also create exceptions to their general bans on non-commercial speech which discriminate in favor of certain types of non-commercial speech and against other types of non-comercial speech. Babylon, Oyster Bay, and Islip each provide an exception to their bans on non-commercial speech for temporary political signs which are connected with political campaigns. BABYLON, N.Y., CODE art. XIX § 213-255(A); OYSTER BAY, N.Y., CODE § 135; ISLIP, N.Y., CODE art. XXIX § 68-395(16). By excepting only a temporary political sign from the ban on non-commercial speech, a town is making a value-

based judgment that saying "vote for X" at election time is more important than saying for example "save the whales" at various times throughout the year. Legislation enacted to reflect such a determination is not constitutionally sound. Babylon also excepts from its ban temporary signs advertising "annual or semiannual event[s] of a nonprofit organization. BABYLON, N.Y., CODE art. XIX § 213–253(Q)(1). Similarly, Oyster Bay makes allowances for "one [temporary] illuminated announcement sign ... when erected or maintained by a public or semi-public agency, eleemosynary organization or permitted club". OYSTER BAY, N.Y., CODE § 127(c). Islip creates an exception for signs "identifying a grand opening, parade, festival, fund drive or similar occasion." ISLIP, N.Y., CODE art. XIX § 68–395(B)(13). Granting an exception for temporary signage only when erected by such entities as semi-public agencies, nonprofit organizations, or "permitted clubs", or only in connection with limited and vaguely defined events, shows an impermissible favoritism for certain types of non-commercial speech and certain types of speakers and, additionally, leaves open the door to abuse of discretion in determinations of who qualifies for the exception.

[12] The Court recognizes that the imposition of reasonable time, place, and manner restrictions upon the expression of non-commercial speech is constitutionally acceptable and undoubtedly necessary. *See Friedman v. Rogers,* 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 *reh'g denied,* 441 U.S. 97, 99 S.Ct. 2018, 60 L.Ed.2d 389 (1979). Such limitations placed upon the erection and maintenance of non-commercial signage are valid to the extent that they are content neutral. *See e.g., Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987), *cert. denied,* — U.S. —, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988); *Candidates' Outdoor Graphic Serv. v. City and*

County of San Francisco, 574 F.Supp. 1240 (N.D.Cal.1983). The ordinances challenged in this action indeed carry many content-neutral provisions regulating, *inter alia,* the permissible range of sign sizes, the size and type of lettering which may be used, illumination, the design of sign structures, where signs may be placed, and the quantity of signs per parcel of land. *See e.g.,* BABYLON, N.Y. CODE art. XIX § 213-253(E)(2)(a)-(1); FREEPORT, N.Y., CODE art. XXI § 210-206(A)-(M); LINDENHURST, N.Y., CODE § 67-5(A) & (B); OYSTER BAY, N.Y., CODE § 128(b) & (c); ISLIP, N.Y., CODE art. XXIX § 68-400(A)-(C); HEMPSTEAD, N.Y., CODE art. XXIV § 246(B) & (C). Such content-neutral provisions were not the object of plaintiff's challenge and are certainly within the scope of the towns' and villages' legislative police power.

[13] Several of the defendants argued that the portions of their respective ordinances which allow only signs advertising the business conducted on the premises are merely content-neutral time, place, and manner restrictions. This Court squarely rejects this contention. In addition to directly contradicting the plurality's opinion in *Metromedia,* this line of reasoning is internally flawed. By their own terms, the ordinances regulate according to the subject matter of the sign, *i.e.,* only a message concerning the business of that location is allowed. Therefore, under the ordinances as they exist, "Joe", for example, may put up a sign on his pizzeria saying "Joe's Famous Pizza" but may not put up a sign in the same spot, of the same size, using identical lettering and colors, expressing his view that "abortion is murder." Nor may he lease this same sign to "Bill" to publicize his message that "free choice is the only choice". Thus, whether the sign is permitted depends solely upon the content of the message being conveyed.

[14] It is important to note that this Court, by its decision, is not pronouncing a positive mandate that plaintiff may erect the desired billboards which prompted it to commence this action. Moreover, the Court is not striking in its entirety the language of the respective ordinances that it has found to be unconstitutional in its effect on non-commercial speech.[7] Instead, in an effort narrowly to tailor constitutionally based injunctive relief, this Court holds only that the defendant towns and villages may not enforce in a manner that disadvantages any type of non-commercial speech the constitutionally offensive language which favors commercial speech above non-commercial speech and prefers the subject matter of certain non-commercial speech above other non-commercial speech.

[15] Furthermore, this Court's holding in no way forecloses defendants from promulgating and enforcing sign regulations in order to achieve greater aesthetics and safety. A municipality need not do away with all sign restrictions in order to stay within constitutional boundaries. In fact, a municipality may still favor on-premises commercial speech above off-premises commercial speech without running afoul of the First Amendment. In *Major Media of the Southeast v. City of Raleigh,* 792 F.2d 1269 (4th Cir.1986), *cert. denied,* 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987), the Fourth Circuit had occasion to examine a sign ordinance much like both the ordinance in *Metromedia* and those being challenged here. The Raleigh ordinance differed from that of *Metromedia* and those now at issue in one critical respect. It contained the provision that "[a]ny sign authorized in this

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[7] The Court is, however, as is discussed above, striking for failure to satisfy the *Central Hudson* test those portions of the ordinances of Babylon, Hempstead, Lindenhurst, and Oyster Bay that plaintiff has challenged.

chapter is allowed to contain non-commercial copy in lieu of any other copy." *Major Media,* 792 F.2d at 1271. The Fourth Circuit upheld the ordinance against a First Amendment. challenge, finding that it did not improperly serve to protect commercial speech to a greater extent than non-commercial speech. *Major Media,* 792 F.2d at 1271. *See also Georgia Outdoor Advertising v. City of Waynesville,* 833 F.2d 43 (4th Cir.1987) (sign ordinance which favored on-premises commercial speech but also allowed non-commercial speech in place of any permitted commercial speech held constitutional).

Enacting a savings clause enables a town to retain control over the number and general appearance of signs that will exist in a given location and to prohibit off-premises commercial speech, as long as the four-point *Central Hudson* test is satisfied, while at the same time ensures that one's right to express non-commercial messages is not abridged. Thus, an amendment which provides for the substitution of non-commercial speech for any permitted copy would allow Joe either to erect a sign advertising "Joe's Famous Pizza', express his view that "abortion is murder", or lease his sign space to Bill for Bill's announcement that "free choice is the only choice", but would still allow the town to prevent Joe from using his sign to say "Product X is the best" or from plastering his property with a multiplicity of signs. Practically, if Joe is allowed to place only one sign on his storefront, his financial interest in either expressing his personal views or leasing this sign space to another. However, this decision should be a function of economic forces, not of a municipality's belief that commercial messages are more essential than non-commercial messages.

CONCLUSION

For the reasons set forth throughout this opinion, the Court holds that plaintiff has standing to pursue this action and is not required to exhaust administrative procedures, and that The Federal Highway Beautification Act does not prevent plaintiff from seeking relief in this Court. The Court further holds that with respect to the ordinances' impact on commercial speech, Freeport and Islip's ordinances are constitutionally valid and thus may be applied to prohibit plaintiff from erecting off-premises sign displays within those localities. The ordinances of defendants Babylon, Hempstead, Lindenhurst and Oyster Bay do not satisfy constitutional requirements and therefore these towns and villages are enjoined from enforcing those ordinances so as to prevent plaintiff from erecting off-premises sign displays within these towns and villages.

Finally, as to the ordinances' impact on non-commercial speech, various aspects of the respective ordinances, as detailed above, are violative of the First Amendment. The defendant towns and villages are hereby enjoined from allowing exceptions to their general bans on speech for certain specified types of non-commercial speech while not extending such exceptions uniformly to all forms of non-commercial speech. The defendants are further enjoined from limiting the various exceptions to the general bans on the utilization of signs contained in the respective ordinances to specific types of commercial speech (such as on-premises commercial speech or real estate-related speech). Such exceptions must be made, at a minimum, equally available to signage displaying non-commercial speech. In other words, the defendant towns and villages may not utilize their ordinances so as to place

restrictions upon the erection of signs containing non-commercial speech which are not also uniformly imposed upon signange which expresses any form of commercial message. Thus, all defendants, including those whose ordinances are constitutional as to their impact on commercial speech, are enjoined from enforcing their sign ordinances to prohibit plaintiff from erecting signs displaying any non-commercial messages at locations where on-premises commercial signage is tolerated.

Accordingly, Clerk of the Court is directed to enter judgment enjoining the defendants from enforcing their sign ordinances in an unconstitutional manner, as detailed in this Memorandum and Order.

SO ORDERED.

EXHIBIT C

461a
JUDGMENT APPEALED FROM,
DATED JANUARY 27, 1989 9Pages (461a-462a).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY

Plaintiff,

-against-

TOWN OF BABYLON, etal

JUDGMENT CV 88-0105 (LDW)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
HAUPPAUGE OFFICE
JAN 30 1989
ENTERED

A memorandum and order of Honorable Leonard D. Wexler, United States District Judge, having been filed on January 4, 1989, directing the Clerk of the Court to enter judgment in accordance with the Court's Decision dated January 4, 1989, it is

ORDERED AND ADJUDGED that:

(1) With respect to the ordinances' impact on commercial speech, Freeport and Islip's ordinances are constituionally valid and thus may be applied to prohibit plaintiff from erecting off-premises sign displays within those localities.

(2) The ordinances of defendants Babylon, Hempstead, Lindenhurst and Oyster Bay do not satisfy constitutional requirements and therefore these towns and villages are hereby enjoined from enforcing those ordinances so as to prevent plaintiff from erecting off-premises sign displays within these towns and villages.

(3) As to the ordinances' impact on non-commercial speech, various aspects of the respective ordinances are violative of the First Amendment.

(4) The defendant towns and villages are hereby enjoined from allowing exceptions to their general bans on speech for certain specified types of non-commercial speech while not extending such exceptions uniformly to all forms of non-commercial speech.

(5) The defendant towns and villages are further enjoined from utilizing their ordinances so as to place restrictions upon the erection of signs containing non-commercial speech which are not also uniformly imposed upon signage which expresses any form of commercial message.

(6) All defendants, including those whose ordinances are constitutional as to their impact on commercial speech, are enjoined from enforcing their sign ordinances to

prohibit plaintiff from erecting signs displaying any non-commercial message at locations where on-premises commercial signage is tolerated.

Dated: Hauppage, New York
January 27, 1989

ROBERT C. HEINEMANN
CLERK OF THE COURT

By: _____
JOSEPH DI TALIA
Deputy Clerk in Charge

Approved as to form

LEONARD D. WEXLER
United States District Judge

EXHIBIT D

FOR THE SECOND CIRCUIT

NOTICE OF MOTION
For Stay of Mandate Pending
Petition for Writ of Certiorari

NATIONAL ADVERTISING COMPANY,
Plantiff-Appellee-Cross-Appellant

-against-

TOWN OF BABYLON, et al.,
Defendants-Appellants-Cross-Appellees
and Defendant Appellee

UNITED STATES COURT OF APPEALS
FILED
APR 27 1990
SECOND CIRCUIT
ELAINE GOLDSMITH, CLERK

MOTION BY:
Stephen L. Breslow, Esq.
Town Attorney, Town of Babylon
200 E. Sunrise Highway
N. Lindenhurst, N.Y. 11757

OPPOSING COUNSEL:
Runton and Williams
100 Park Avenue, 10th floor
New York, N.Y. 10017

Has Counsel of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument denied? ☐ Yes ☒ No

(Substantiated motions only)

Requested return date: May 8, 1990

(See Second Circuit Rule 37(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of argument notice? ☐ Yes ☐ No

C. If Yes, enter date _____

Judge or agency whose order is being appealed:
Honorable Leonard D. Wexler, United States District Judge.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: Motion is for stay Mandate Pending Petition for Writ Certiorari

Will the parties agree to maintain the status quo until the motion is heard: ☐ Yes ☐ No

STEPHEN L. BROSLOW
Appearing for:
Town of Babyon
April 23, 1990

It is hereby ordered that the motion be and it hereby is granted, stay not to exceed thirty days.

UNITED STATES COURT OF APPEALS
FILED
MAY 18 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

D-3

A-155

UNITED STATES COURT OF APPEALS
FILED
MAR 01 1989
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

DC: EDNY
DC #: CV-88-0105
DC JUDGE: WEXLER

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of March, one thousand nine hundred and Eighty-eight.

NATIONAL ADVERTISING COMPANY,

Plaintiff-Appellee,

v.

TOWN OF BABYLON, INCORPORATED VILLAGE OF LINDENHURST, TOWN OF BROOKHAVEN, TOWN OF OYSTER BAY, TOWN OF ISLIP and TOWN OF HEMPSTEAD,

Defendants-Appellants.

DOCKET NUMBER 89-7144 &
89-7192
(APPEAL DISMISSED IN 89-7192 ONLY)

The Civil Appeals Management Plan of this Court directs that within ten (10) days after filing a Notice of Appeal, the Appellant shall file and serve a Pre-Argument Statement (Form C), order a transcript of the proceedings from the court reporter and file and serve a statement concerning same (Form D), pay the docketing fee, and, that in the event of default of any of these requirements, the Clerk may dismiss the appeal without further notice.

The Appellant herein, having not so proceeded,
Upon consideration thereof, it is
Ordered that the appeal from the JUDGMENT
of the United States District Court for the Eastern
District of New York
be, and it hereby is, dismissed.

ELAINE B. GOLDSMITH
Clerk
By

JONNE JAMES
Deputy Clerk

A-159

ORDER
CV 88-0105
(Wexler, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY,

Plaintiff,

-against-

TOWN OF BABYLON, et al.,

Defendants.

APPEARANCES:

HUNTON & WILLIAMS, ESQS.
BY: FRANKLIN H. STONE, ESQ.
Attorneys for Plaintiff
100 Park Avenue
New York, New York 10017

THOMAS F. WHALEN, BABYLON TOWN ATTORNEY
Attorney for Defendant TOWN OF BABYLON
200 E. Sunrise Highway
Lindenhurst, New York 11757

GUY W. GERMANO, ISLIP TOWN ATTORNEY
BY: LAWRENCE DONOHUE, ESQ.
Attorney for Defendant TOWN OF ISLIP
655 Main Street
Islip, New York 11751

ROBERT SCHMIDT, OYSTER BAY TOWN ATTORNEY
Attorney for Defendant TOWN OF OYSTER BAY
Town Hall
54 Audrey Avenue
Oyster Bay, New York 11771

W. KENNETH CHAVE, HEMPSTEAD TOWN ATTORNEY
BY: DANIEL F. McCARTHY, ESQ.
Attorney for Defendant TOWN OF HEMPSTEAD
1 Washington Street
Hempstead, New York 11550

WILLIAM F. GLACKEN, ESQ.
Attorney for Defendant INC. VILLAGE OF FREEPORT
46 North Ocean Avenue
Freeport, New York 11520

EDWARD YOUNG, ESQ.
Attorney for Defendant INC. VILLAGE OF LINDENHURST
112 Farmingdale Road
P.O. Box 1810
West Babylon, New York 11704

WEXLER, District Judge

On January 4, 1989, this Court granted National Advertising, Inc. injunctive relief, striking down as unconstitutional the portions of the sign ordinance of Oyster Bay that restrict outdoor signs to on-premise advertising. Oyster Bay has filed a motion to vacate the Court's judgment alleging that; (1) it was not within the Court's discretion to convert an action for a declaratory judgment to a motion for summary judgment; (2) the Court improperly placed the burden of proving a substantial governmental interest upon the defendant; and (3) that the Court mistakenly held that the defendant failed to offer any evidence as to the objectives underlying the ordinances in question.

Oyster Bay's motion to vacate is without merit. These issues have been disposed of by the Court in its Order. The motion is denied.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
March 10, 1989

A-161
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
MAR 16 1989
ELAINE B. GOLDSMITH, CLERK

DC: EDNY
DC n: 88-CV-0105
DC Judge: WEXLER

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Sixth-teenth day of March, one thousand nine hundred and eighty nine.

DOCKET NUMBER 89-7248

NAT'L ADVERTISEMENT CO V TOWN OF BABYLON

The Civil Appeals Management Plan of this Court directs that within ten (10) days after filing a Notice of Appeal, the Appellant shall file and serve a Pre-Argument Statement (Form C), order a transcript of the proceedings from the court reporter and file and serve a statement concerning same (Form D), pay the docketing fee, and that in the event of default of any of these requirements, the Clerk may dismiss the appeal without further notice.

The Appellant herein, having not so proceeded,
Upon consideration thereof, it is
Ordered that the appeal from the Judgment
of the United States District Court for the Eastern

District of New York,
be, and it hereby is, dismissed.

ELAINE B. GOLDSMITH,
Clerk
By

RAMBERTO RODRIGUEZ,
Deputy Clerk

CERTIFIED:
March 20, 1989

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
By F. CASSIDY
Deputy Clerk

A-165

ORDER
CV 88-0105
(Wexler, J.)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
HAUPPAUGE, N.Y.
APR 2 1989
ENTERED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY,
Plaintiff,

-against-

TOWN OF BABYLON, et al.,
Defendants.

APPEARANCES:

HUNTON & WILLIAMS, ESQS.
BY: FRANKLIN H. STONE, ESQ.
Attorneys for Plaintiff
100 Park Avenue
New York, New York 10017

GUY W. GERMANO, ISLIP TOWN ATTORNEY
BY: LAWRENCE DONOHUE, ESQ.
Attorney for Defendant TOWN OF ISLIP
655 Main Street
Islip, New York 11751

ALLEN I. SAK, BROOKHAVEN TOWN ATTORNEY
Attorney for Defendant TOWN OF BROOKHAVEN
3233 Route 112
Medford, New York 11763

ROBERT SCHMIDT, OYSTER BAY TOWN ATTORNEY
Attorney for Defendant TOWN OF OYSTER BAY
Town Hall
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Oyster Bay, New York 11771

W. KENNETH CHAVE, HEMPSTEAD TOWN ATTORNEY
BY: DANIEL F. McCARTHY, ESQ.
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WILLIAM F. GLACKEN, ESQ.
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STEVEN KRETZ, ESQ.
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AMITYVILLE
36 Montauk Highway
Lindenhurst, New York 11757

EDWARD YOUNG, ESQ.
Attorney for Defendant INC. VILLAGE OF
LINDENHURST
112 Farmingdale Road
P.O. Box 1810
West Babylon, New York 11704

WEXLER, District Judge

Pursuant to Fed. R. Civ. P. 56, the Court will treat plaintiff's request for a preliminary injunction as a motion for summary judgment permanently enjoining defendants from applying certain billboard ordinances in a manner that violates plaintiff's First Amendment right to free speech. The parties are requested to submit any additional papers they wish the Court to consider with respect to the application for a permanent injunction by May 9, 1988.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
April 25, 1988

ORDER OF JUDGE WEXLER, DATED APRIL 12, 1989
(Pages 427a-430a).

ORDER
CV 88-0106
(Wexler, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY,

Plaintiff,

-against-

TOWN OF BABYLON, et al.,

Defendants.

APPEARANCES:

HUNTON & WILLIAMS ESQS.
BY: FRANKLIN H. STONE, ESQ.
Attorneys for Plaintiff
100 Park Avenue
New York, New York 10017

KENNETH SEIDELL, BABYLON TOWN ATTORNEY
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Attorney for Defendant TOWN OF OYSTER BAY
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Oyster Bay, New York 11771

W. KENNETH CHAVE, HEMPSTEAD TOWN ATTORNEY
BY: DANIEL F. McCARTHY, ESQ.
Attorney for Defendant TOWN OF HEMPSTEAD
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Hempstead, New York 11550

WILLIAM F. GLACKEN, ESQ.
Attorney for Defendant Inc. VILLAGE OF FREEPORT
46 North Ocean Avenue
Freeport, New York 11520

EDWARD YOUNG, ESQ.
Attorney for Defendant INC. VILLAGE OF LINDENHURST
112 Farmingdale Road
P.O. Box 1810
West Babylon, New York 11704

WEXLER, Judge

On January 4, 1989, this Court struck down, *inter alia*, portions of the sign ordinance of the Town of Hempstead that restricts outdoor signs to on-premises advertising. The Court stated:

> The [Supreme Court states] that there must be a

> substantial governmental interest asserted to support the restriction on constitutionally protected commercial speech ... A mere cursory examination of [Hempstead's ordinance] reveals a complete absence of any stated purpose to support [its ban] on offsite commercial advertising.
>
> Moreover, at the hearing [and even after the Court converted the preliminary injunction motion into a motion for summary judgment, Hempstead] did not offer any evidence, by way of affidavit or otherwise, that would indicate the motives that lend to the promulgation of [its ordinance.]

See Court's Decision dated January 4, 1989 at P.P. 12-13.

Pursuant to Fed. R. Civ. P. 59(e), Hempstead moves to alter or amend the judgment and seeks to explain the purpose of its ordinance.

Hempstead argues that its sign ordinance *does* indicate its purpose. Hempstead points to § 242 of the Hempstead sign Ordinance which states:

> § 242. Compliance required; variances.
>
> A. No sign shall be permitted in any use district, except as provided in this Article as authorized by the Board of Zoning Appeals.
>
> B. When an application is filed with the Board of Zoning Appeals for permission to erect any sign which is not in accordance with the provisions of this Article, the Board shall prior to making a determination, take cognizance of:

(1) the character of the district.

(2) The existence, location, site, and nature of other signs in the vicinity.

(3) Whether or not such sign is customarily essential to the primary use of the premises.

(4) Whether the construction or location of the proposed sign will interfere with necessary light or air or impair property or aesthetic values or otherwise endanger the health and welfare of the public.

(5) The purposes to which § 263[1] of the [New York] Town Law refers.

Nevertheless, section 242 of Hempstead's Sign Ordinance does not state the purpose of the ordinance. Instead, it *concerns the authority* of the Town's Board of Zoning Appeals to allow *variances* to the uses permitted under the sign ordinance. This section provides that in deciding whether to grant

---

FOOTNOTE

[1] New York Zoning and Planning Law, Town Law § 263 states in full:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefore; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality

variances, the Board should take into account certain considerations, which are listed in section 242(B). Thus, § 242 (B) does not provide the *rationale* for the sign ordinance.

Therefore, Hempstead's motion to alter or amend the judgment is denied.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
April 12, 1989

D-18

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED
MAR 27 1989
ELAINE B. GOLDSMITH, CLERK

NOTICE OF MOTION
for the reinstatement of an appeal dismissed for lack of prosection.

DOCKET NO. 89-7144 (L)
89-7248

EDNY
88 CIV 0105
WEXLER

NATIONAL ADVERTISING COMPANY,
Plaintiff

-against-

TOWN OF BABYLON, et al.,
Defendants

MOTION BY:
Ronald J. Levinson, Esq.,
Town Attorney, Town of Hempstead
Main Street
Hempstead, N.Y. 11757
516-489-5000
Daniel P. McCarthy, Esq.

OPPOSING COUNSEL:
Myron Cohen, Esq.
Hunton & Williams, P.C.
100 Park Ave.
New York, N.Y.

Has Counsel of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date: April 4, 1989

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

B. by firm date of argument notice? ☐ Yes ☒ No

C. If Yes, enter date _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard: ☐ Yes ☐ No

Judge or agency whose order is being appealed:
Honorable Leonard D. Wexler, U.S.D.J.-E.D.-N.Y.-action #88 CV 0105

We request that the appeal which was dismissed by the Clerk's Office for lack of prosecution due to failure to timely file forms C and D with this court.

Daniel P. McCarthy, Esq. for Town of Hempstead
Appearing for: Defendant 3/23/89

ORDER

It is hereby ordered that the motion be and it hereby is granted, on condition that the parties submit a stipulation withdrawing the appeal, under FRAP 4(a)(4), on the court-approved form, as was done on the appeal by Oyster Bay.

A TRUE COPY
ELAINE B. GOLDSMITH,
CLERK
April 6, 1989

by S.A. Bass
Staff Counsel

UNITED STATES COURT OF APPEALS
FILED
APR 6 1989
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

D-21

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED
AUG 22 1989
ELAINE B. GOLDSMITH, CLERK

NOTICE OF MOTION
To Dismiss the Appeal
in Docket No. 89-7192

DOCKET NO. 89-7144 (L)

NATIONAL ADVERTISING COMPANY,
Plaintiff-Appellee-Cross-Appellant,

-against-

TOWN OF BABYLON, et al.,
Defendants-Appellants-Cross-Appellees and Defendant-Appellee.

MOTION BY:
Christopher M. Mason
HUNTON & WILLIAMS
100 Park Avenue, 10th Floor
New York, New York 10017

OPPOSING COUNSEL:
Thomas F. Whalen
BABYLON TOWN ATTORNEY
200 East Sunrise Highway
Lindenhurst, New York
11757(516) 957-3029

Has Counsel of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)
Requested return date: September 12, 1989
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need
for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard: ☐ Yes ☐ No

Judge or agency whose order is being appealed:
Honorable Leonard D. Wexler, United States District Judge

Dismissal of the appeal in Docket No. 89-7192, together with an award of attorneys' fees and costs.

By Christopher M. Mason appearing for National Advertising Company, Plaintiff, August 21, 1989

ORDER

IT IS HEREBY ORDERED that the motion of National Advertising Co. to dismiss the appeal of the Town of Babylon in dkt. 89-7192 be and it hereby is considered withdrawn without prejudice in light of the notice of withdrawal filed on consent.

For the Court,
Elaine B. Goldsmith, Clerk

by Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
SEP 19 1989
ELAINE B. GOLDSMITH, CLERK

ORDER
CV 88-0105
(Wexler, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY,

Plaintiff,

—against—

TOWN OF BABYLON, et al.,

Defendants.

APPEARANCES:

HUNTON & WILLIAMS, ESQS.
BY: FRANKLIN H. STONE, ESQ.
Attorneys for Plaintiff
100 Park Avenue
New York, New York 10017

THOMAS F. WHALEN,
BABYLON TOWN ATTORNEY
Attorney for Defendant TOWN OF BABYLON
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GUY W. GERMANO, ISLIP TOWN ATTORNEY
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Islip, New York 11751

ROBERT SCHMIDT,
OYSTER BAY TOWN ATTORNEY
Attorney for Defendant TOWN OF OYSTER BAY
Town Hall
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W. KENNETH CHAVE,
HEMPSTEAD TOWN ATTORNEY
BY: DANIEL F. McCARTHY, ESQ.
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1 Washington Street
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WILLIAM F. GLACKEN, ESQ.
Attorney for Defendant INC. VILLAGE OF FREEPORT
46 North Ocean Avenue
Freeport, New York 11520

EDWARD YOUNG, ESQ.
Attorney for Defendant INC. VILLAGE
OF LINDENHURST
112 Farmingdale Road
P.O. Box 1810
West Babylon, New York 11704

WEXLER, District Judge

In this lawsuit, plaintiff sought to enjoin defendants from enforcing defendants' billboard ordinances.

The Court's decision, dated January 4, 1989, is presently on appeal before the Second Circuit. Now plaintiff moves this

Court for § 1988 attorney's fees and costs.

Due to the complexity of the constitutional issues raised in this case, the Court will not rule on plaintiff's motion for § 1988 fees until the Second Circuit decides the appeal.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
May 18, 1989

ORDER
CV 88-0105
(Wexler, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY,

Plaintiff,

—against—

TOWN OF BABYLON, et al.,

Defendants.

APPEARANCES:

HUNTON & WILLIAMS, ESQS.
BY: FRANKLIN H. STONE, ESQ.
Attorneys for Plaintiff
100 Park Avenue
New York, New York 10017

THOMAS F. WHALEN,
BABYLON TOWN ATTORNEY
Attorney for Defendant TOWN OF BABYLON
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Lindenhurst, New York 11757

GUY W. GERMANO, ISLIP TOWN ATTORNEY
BY: LAWRENCE DONOHUE, ESQ.
Attorney for Defendant TOWN OF ISLIP
655 Main Street
Islip, New York 11751

ROBERT SCHMIDT,
OYSTER BAY TOWN ATTORNEY
Attorney for Defendant TOWN OF OYSTER BAY
Town Hall
54 Audrey Avenue
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WEXLER, District Judge

On January 4, 1989, this Court granted National Advertising, Inc. injunctive relief, striking down as unconstitutional the portions of the sign ordinance of Oyster Bay that restrict outdoor signs to on-premise advertising. Oyster Bay has filed a motion to vacate the Court's judgment alleging that; (1) it

was not within the Court's discretion to convert an action for a declaratory judgment to a motion for summary judgment; (2) the Court improperly placed the burden of proving a substantial governmental interest upon the defendant; and (3) that the Court mistakenly held that the defendant failed to offer any evidence as to the objectives underlying the ordinances in question.

Oyster Bay's motion to vacate is without merit. These issues have been disposed of by the Court in its Order. The motion is denied.

SO ORDERED.

LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
March 10, 1989

Civil Action No. 88/0105
(Wexler, J.)
ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL ADVERTISING COMPANY

Plaintiff,

—against—

TOWN OF BABYLON, INCORPORATED VILLAGE OF AMITYVILLE, INCORPORATED VILLAGE OF LINDENHURST, TOWN OF BROOKHAVEN, INCORPORATED VILLAGE OF FREEPORT, TOWN OF OYSTER BAY, TOWN OF ISLIP, and TOWN OF HEMPSTEAD,

Defendants.

On reading the Complaint filed herein and the affidavit of Myron D Cohen sworn to on January 14, 1988, the affidavits of Richard M. Salomone, sworn to on January 13, 1988, the exhibits thereto, and the memorandum of law submitted herewith and on motion of plaintiff National Advertising Company, by its attorneys Hunton & Williams, and

It appearing to the Court that the issuance of an order to show cause is necessary and proper in the matter; that immediate and irreparable injury to the plaintiff's First Amendment rights to free speech and the plaintiff's business interests may result before a hearing can be had in the normal course on plaintiff's motion for a preliminary injunction, for which

plaintiff may have no recovery, and for the further reason that it is in the public interest;

IT IS ORDERED that the defendants, save for the incorporated Village of Amityville, show cause on the 28 day of January, 1988 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States District Courthouse, for the Eastern District of New York, Hauppauge, New York, why plaintiff's motion for a preliminary injunction should not be granted; and it is

FURTHER ORDERED that copies of this order and the papers upon which it is granted shall be personally served on the defendants on or before 4 o'clock on the 22 day of January, 1988.

Dated: New York, New York
January 20, 1988

Issued at 10 o'clock, January 20, 1988

_____

United States District Judge

EXHIBIT E

CONSTITUTION

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

EXHIBIT F

CONSTITUTION

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE XIX
Signs
[Added 12-21-76]

§ 213-251 Definitions. [Amended 12-7-82 by Res. No. 14]

As used in this Article, the following terms shall have the meanings indicated:

SIGN — Any material or structure or part thereof displaying lettered or pictorial matter which is placed upon or affixed to the exterior of any building or is separately erected as an advertisement, announcement, notice or name, but does not include:

A. Signs erected and maintained in connection with the discharge of any government function.

B. The standard signs of public utilities, each of which, however, is limited in size to twelve by twelve (12 x 12) inches, and placed in an area designed to inform the public of the location on the premises of utility facilities available to the general public.

§ 213-252. Signs in residential districts. [Amended 9-3-80 by Res. No. 4]

No sign shall be erected, placed or maintained in any residential district, except:

A. A professional nameplate, affixed to a building and indicating the office of a physician, surgeon, dentist or practitioner or some other recognized profession, the maximum size of which shall be two (2) feet square. In the alternative, a professional nameplate may be affixed to the ground, in which event, the maximum size thereof shall be one by two (1 x 2) feet; it shall be erected at a height of not more than four (4) feet from the ground, and it shall be placed at least ten (10) feet from the nearest property lines. Such sign may be illuminated by an electric lamp not exceeding fifteen (15) watts of power contained within the sign.

B. Any illuminating professional nameplate shall be equipped with shielding devices so that the glow emanating therefrom shall be directed only on and towards such premises. All signs and devices which do not conform to this subsection shall be removed on or before five (5) years from the date of the adoption of this amendment. [Added 12-7-82 by Res. No. 14]

C. Not more than one (1) sign in connection with the sale, rental, construction or improvement of the land or premises upon which it is located. The maximum dimensions thereof shall be an area of four (4) square feet and five (5) feet in height to the top of the sign structure. Such signs may only be illuminated by ground lighting or internal illumination.

§ 213-253. Signs in business and industrial districts.

A. Permit required. It shall hereafter be unlawful, except as otherwise provided herein, for any person to erect, construct, alter, relocate, reconstruct, display or maintain in any business, manufacturing or industrial district, any sign without first having obtained a written permit from the Building Inspector, in compliance with the provisions herein. All signs shall be subject to the approval of the Building Inspector as to the structural safety thereof in conformity with recognized engineering standards.

B. Application for permit. Any person who wishes to procure a permit as above required shall file with the Building Inspector a written application accompanied by a scale drawing showing the structural members, the lettering, the pictorial matter composing the sign structure, a location plan showing the position of the sign on the building, structure or plot of land and such other information as the Building Inspector may require to show compliance with

(Cont'd on page 21417)

the provisions of the Article. The applicant shall also present a written statement showing the name of the owner or of the person in control of the building, structure or plot of land where such sign is to be located, and the right or authority of the applicant to obtain a permit.

C. Fees. Except as otherwise provided, no sign permit shall be issued until the applicable fee established by the Town Board from time to time is paid. **[Amended 2-15-77]**

D. Renewal. Every sign permit shall be renewed every two (2) years upon the payment of the renewal fee and each application for a renewal permit shall be accompanied by a certificate certifying that the sign has been inspected by the Building Inspector and found to be properly hung in a secure and safe position, and further certifying that the sign in every way complies with the provisions of this Article.

E. **[Amended 12-7-82 by Res. No. 14]** Applications to erect signs on walls shall be classified as either entrance signs or wall signs.

(1) There shall be no more than one (1) sign per wall. All signs and devices which do not conform to this subsection shall be removed on or before five (5) years from the date of the adoption of this subsection.

(2) Any sign affixed to the exterior face of a wall having a street entrance facing a public thoroughfare on the subject parcel's parking area shall be considered an entrance sign.

(a) No such sign shall project more than one (1) foot from the front wall nor the lowest point of contact between the sign structure and a mansard or facade.

(b) No such sign shall be wider than the building or structure on which the sign is affixed and in no event shall exceed one hundred (100) feet in length nor six (6) feet in height.

(c) No such sign(s) shall cover or obstruct any part of a window, door, ventilation system, fire exit or any means of ingress or egress.

(d) An entrance sign on the wall of the principal entrance may not exceed eighty percent (80%) of the full width of the wall.

(e) An entrance sign on any wall other than the principal entrance may not exceed fifty percent (50%) of the full width of the wall. All signs and devices which do not conform to this subsection shall be removed on or before five (5) years from the date of the adoption of this subsection.

(f) No such sign(s) may exceed in area two (2) square feet per each horizontal foot of such wall.

(g) All entrance sign(s) shall be maintained in a good state of repair and neatly painted and in good operating condition.

(h) No such sign shall be painted, colored or etched directly upon any wall.

(i) An entrance sign may be erected on a permanent structure canopy if it is structurally sound and may not extend beyond the top of the parapet.

(j) If an entrance sign is immediately adjacent to a roadway, sidewalk or driveway on the subject parcel's parking area, it shall be not less than eight (8) feet from grade.

(k) No entrance sign shall be designed or constructed on which the artificial or reflected light is not maintained stationary and constant in intensity and color at all times, except for that part of the sign which displays the time and/or temperature exclusively.

(l) No entrance sign shall be designed or constructed to move, oscillate or rotate.

(3) Wall signs. Any single-faced sign facing a public thoroughfare, which is attached to or incorporated into the exterior wall of any building, other than a designated entrance sign, shall be considered a wall sign.

(a) No such sign shall project more than one (1) foot from the wall or lowest point of contact between the sign structure and the building structure.

(b) No such sign shall be wider than the building or structure on which the sign is affixed and shall not exceed fifty (50) feet in length or six (6) feet in height.

(c) No such sign shall cover or obstruct any part of a window, door ventilation system, fire exit or any means of ingress or egress.

(d) No such sign may cover more than fifty percent (50%) of the full width of any wall.

(e) No such sign(s) may exceed in area one (1) square foot per each horizontal foot of such wall.

(f) All wall signs shall be maintained in a good state of repair, neatly painted and in good operating condition.

(g) No such sign shall be painted, colored or etched directly upon any wall.

(h) A wall sign may be erected upon a permanent structural canopy or mansard roof, but may not extend above the standing parapet.

(i) If a wall sign is immediately adjacent to a roadway, sidewalk or driveway, on the subject parcel's parking area, it shall be not less than eight (8) feet from grade.

(j) No wall sign shall be designed or constructed on which the artificial or reflected light is not maintained stationary and constant in intensity

and color at all times, except for that part of the sign which displays the time and/or temperature exclusively.

(k) No wall sign shall be designed or constructed to move, oscillate or rotate.

F. Vacant land signs. Two (2) signs, not to exceed an area of sixteen (16) square feet each, facing each major thoroughfare at which the vacant land is situated, announcing the availability thereof, may be erected on any vacant lot in business or industrial districts. There shall be no illumination of such signs. Permits for such signs shall be granted for a period of the lesser of one (1) year or such time as the property is sold. Each sign shall be removed within a period of ten (10) days following the expiration of such permit.

G. Ground signs (freestanding). Ground signs in business districts and industrial districts shall be permitted, subject to the following limitations and specifications:

(1) Such signs shall only be permitted on a plot of ground on which a business or industry is conducted and only as an accessory thereto.

(a) When the primary use of the parcel is for the purposes of retail sales, there shall only be permitted one (1) ground sign on the parcel. All signs and devices which do not conform to this subsection shall be removed on or before five (5) years from the date of the adoption of this subsection. **[Added 12-7-82 by Res. No. 14]**

(b) When the primary use of the parcel is industrial use, there shall be permitted one (1) ground sign on each street frontage of the parcel. **[Added 12-7-82 by Res. No. 14]**

(2) Such sign shall only advertise the name of the business conducted on the premises or its trademark, product or service offered.

(3) No such sign shall exceed fifteen (15) feet in height from grade to the top of the sign structure, nor exceed thirty-two (32) square feet in area.

(4) There are no minimum height requirements for ground signs. However, should the ground sign be located within a radius of thirty (30) feet of the corner formed by an intersecting road or highway, the ground sign shall not exceed two and one-half (2½) feet in height from elevation of the crown of adjoining roadway or, alternatively, be less than eight (8) feet in height from grade to assure unobstructed view to pedestrians and motorists. **[Amended 10-19-82 by Res. No. 7]**

(5) No such sign shall be erected nearer than ten (10) feet to any front or rear property line or nearer than five (5) feet to any property line. **[Amended 12-7-82 by Res. No. 14]**

(6) All such signs shall be securely built subject to the approval of the Building Inspector as to the structural safety thereof by recognized engineering standards.

(7) All such signs may be illuminated, but only by either indirect or enclosed neon lighting.

(8) No sign shall be designed or constructed to move, oscillate or rotate.

(9) When located in a nonlandscaped area, all signs shall be protected from vehicular damage by an approved curb and suitably shrubbed planting area, acceptable to the Chief Building Inspector, that shall be equal in area to one and one-half (1½) times the area of the sign. The sign or any part of the sign may not be located within two (2) feet of the approved curb. All signs and devices which do not conform to this subsection shall be removed on or before five (5) years from the date of the adoption of this subsection. **[Amended 12-7-82 by Res. No. 14]**

(10) Public information signs shall be permitted, subject to Planning Board approval.

(11) No ground sign shall be designated or constructed on which the artificial or reflected light is not maintained stationary and constant in intensity and color at all times, except for that part of the sign which displays the time and/or temperature exclusively. **[Added 12-7-82 by Res. No. 14]**

(12) All wood portions of the ground sign structure must be painted or treated to prevent decay. **[Added 12-7-82 by Res. No. 14]**

H. Theater marquees. Signs upon the marquees of theaters may be permitted, subject to approval of the Planning Board. **[Amended 12-7-82 by Res. No. 14]**

I. **[Added 12-7-82 by Res. No. 14]** Directory signs.

(1) A "directory sign" is a sign identifying two (2) or more persons, agencies or establishments, located in a place or location common to all. Each parcel shall, as a whole, be allowed one (1) freestanding directory sign on the premises (in lieu of a permitted ground sign) to be used for the exclusive purpose of notifying the public of the names of the various business establishments located on the parcel. No advertising of any sort shall be allowed on such sign other than to identify the shopping center or industrial area itself. The maximum square footage and height of the directory sign shall be as determined by the following table:

Category	Number of Tenants	Maximum Square Footage	Maximum Height (feet)
A	2 - 5	32	15
B	6 - 10	50	15
C	11 - 20	75	18
D	21 or more	100	20

(2) There are no minimum height requirements for directory signs. However, should the directory sign be located within a radius of thirty (30) feet of the corner formed by an intersecting road or highway, the

directory sign shall not exceed two and one-half (2½) feet in height from elevation of the crown of adjoining roadway or, alternatively, be less than eight (8) feet in height from grade to assure unobstructed view to pedestrians and motorists.

(3) Directory signs shall only be permitted on a plot of ground on which the business or industry is conducted and only as an accessory thereto.

(4) Unless otherwise stated in this Article, no directory sign may be erected nearer than ten (10) feet to any property line.

(5) All directory signs shall be securely built, subject to the approval of the Chief Building Inspector as to the structural safety thereof by recognized engineering standards.

(6) Directory signs may be illuminated, but only by either indirect or internal lighting.

(7) When located in a nonlandscaped area, all signs shall be protected from vehicular damage by an approved curb and suitably shrubbed planting area, acceptable to the Chief Building Inspector, that shall be equal in area to one and one-half (1½) times the area of the sign. The sign or any part of the sign may not be located within two (2) feet of the approved curb.

(8) No directory sign shall be designed or constructed on which the artificial or reflected light is not maintained stationary and constant in intensity and color at all times, except for that part of the sign which displays the time and/or temperature exclusively.

(9) No directory sign shall be designed or constructed to move, oscillate or rotate.

(10) All wood portions of the ground sign structure must be painted or treated to prevent decay.

J. **[Amended 12-7-82 by Res. No. 14]** Directional signs. Signs directing traffic on premises shall be permitted, not ex-

ceeding four (4) square feet in area and not exceeding two and one-half (2½) feet in height to the top of the sign structure. Such signs may be double-faced, but may not exceed eight (8) inches in depth. Indirect illumination is the only permissible method for illumination of directional signs.

K. Roof signs. No sign shall be permitted to be erected, affixed or constructed upon the roof of any structure, unless it meets the criteria established for aviation signs.

L. Independent signs. No sign or signs independently used as an accessory use to identify the business or industry conducted upon the premises shall be permitted on the wall of any building or structure; or on any plot of land facing a public parking area operated by the town or facing a public waterway. All off-premises signs are prohibited. [**Amended 12-7-82 by Res. No. 14**]

M. Illuminated signs. Any sign which has characters, letters, figures, designs or outlines, illuminated by electric lights or luminous tubes as part of the sign proper, is an illuminated sign. The application for a permit for erection of a sign in which electrical wiring and connections are to be used, if it shall comply in all other respects, shall be granted, subject to the applicant furnishing the Building Inspector, within fifteen (15) days after the completion of the construction and/or the erection of the illuminated sign, a Board of Underwriters' temporary certificate showing that the sign has been properly installed, insofar as it applies to all wiring connections and other electrical requirements. In the event that said Underwriters' certificate is not filed with the Building Inspector within fifteen (15) days after the completion and erection of said sign, the permit therefor shall be deemed null and void. The permanent Underwriters' certificate shall be filed within sixty (60) days from the date of permit, and if not so filed in the Office of the Building Inspector, the permit shall be deemed null and void.

N. Signs over streets. No person shall erect or place upon or over any street or sidewalk any sign, display, streamer or

banner bearing any advertising or notice, unless, after application to the Town Board, permission therefor is granted upon a finding that the display thereof would not be injurious to the public safety, morals and welfare. But nothing herein contained shall be construed as prohibiting any person from erecting and maintaining adjustable awnings made of cloth, with iron or tube frames, and at least eight (8) feet above the sidewalk.

O. **[Amended 9-15-81 by Res. No. 7]** Gasoline filling stations and garage signs.

(1) Not more than one (1) such sign per gasoline and/or petroleum filling station and/or garage, not exceeding thirty-two (32) square feet in area, suspended from or attached to not more than one (1) pole or post embedded in the ground, provided that the lowest part of said sign shall not be less than eight (8) feet above grade and shall not be greater than fifteen (15) feet in height, provided that the same advertises only the product or services sold on the premises. All signs erected pursuant to this subsection shall be set back not less than five (5) feet from any property line when erected.

(2) Signs for the advertisement of the selling price of gasoline to be used by gasoline filling stations and battery and tire service stations, shall be limited to:

(a) One (1) price sign not to exceed three by four (3 x 4) feet or twelve (12) square feet, with changeable uniform letters, together with the grade, if any, of the gasoline. The price sign shall be mounted on the logo-pylon at least eight (8) feet from grade but no more than fifteen (15) feet above grade or mounted on the building at least eight (8) feet from grade, but no more than fifteen (15) feet above grade or above the building roof line. The type, structure and mounting of the sign shall conform with all other requirements of this chapter. **[Amended 12-7-82 by Res. No. 14]**

(b) A sign or placard not less than seven (7) inches in height and eight (8) inches in width, nor larger than twelve (12) inches in width, and stating clearly and legibly in numbers of uniform size the selling price or prices per gallon of such gasoline so sold or offered for sale from any pump or other dispensing device, together with the grade, if any, of the gasoline.

(3) No other sign or placard stating or referring to the price or prices of gasoline shall be placed or maintained on any part of the premises upon which gasoline is sold or offered for sale or upon which any gasoline filling station and battery and tire service station business is conducted.

P. Mobile signs. Mobile signs standing on the ground or attached to vehicles or trailers shall be prohibited, except signs painted on registered vehicles identifying the owner and utilized in the conduct of such business. Vehicles or trailers may not be used primarily for on- or off-premises advertising.

Q. [**Amended 12-7-82 by Res. No. 14**] Special event signs. Special event signs shall be permitted in the following instances:

(1) To advertise an annual or semiannual event of a nonprofit organization for a period of thirty (30) days prior to such event.

(2) To advertise a retail establishment for a period of fifteen (15) days.

(3) All such signs shall be submitted to the Division of Building for approval.

(4) All such signs shall be constructed of a fire-resistant material and erected in a manner that in no way endangers the public safety.

(5) Such signs will be permitted only for two (2) specified periods per year.

§ 213-254. Bonus sign area criteria. [Added 12-7-82 by Res. No. 14]

To encourage excellence in design and aesthetics, the maximum sign areas for certain wall, ground and directory signs, as set forth in this Article, may be increased by the percentages as provided for herein. A separate bonus is granted for compliance with each of the criteria and the area is cumulative, but the percentage increase is based on the original sign area limitation.

A. Wall signs may be increased as follows:

(1) Twenty percent (20%) when all the lettering and background is uniform in style and color for signs in a shopping center or for any three (3) consecutive separate establishments.

(2) Ten percent (10%) if the wall sign is the only sign identifying the establishment.

(3) Five percent (5%) if the sign is designed to contain only the name or logo of the establishment without advertisement of any products sold on the premises.

B. Ground signs may be increased as follows:

(1) Twenty percent (20%) when the sign is installed in an approved curb and suitably shrubbed planting area that shall be equal in area to three (3) times the area of the sign and the sign is approved by the Planning Board.

(2) Ten percent (10%) if the ground sign is the only sign identifying the establishment.

(3) Five percent (5%) if the sign is designed to contain only the name or logo of the establishment without advertisement of any products sold on the premises.

C. Directory signs may be increased as follows:

(1) Twenty percent (20%) when the sign is installed in an approved curb and suitably shrubbed planting area that shall be equal in area to three (3) times the area of the sign and the sign is approved by the Planning Board.

(2) Ten percent (10%) when the sign utilizes uniform coloring and lettering for all establishments listed on the directory sign.

(3) Ten percent (10%) if the directory sign is the only sign identifying the establishment.

D. The maximum sign areas for individual signs may be increased by an additional ten percent (10%) if the sign motif is consistent with a sign motif (i.e., nautical, tudor, contemporary, provincial, etc.) that has been designated as the theme sign motif for the zone (area) in which the sign is located. The intent is to create a consistent aesthetic appearance and community identity for designated areas of the town by encouraging theme-type signs. Theme sign motive zones and sign eligibility shall be as determined by the Chief Building Inspector.

§ 213-255. Sign standards.

A. Political signs. Signs advertising political candidates and/or issues in any primary, general or special district election or referendum shall be permitted in any district, upon approval of the Building Inspector for a period of thirty (30) days prior to any such election and shall be removed within ten (10) days after said election. At any time thereafter, the Division of Building is hereby authorized to remove such sign pursuant to § 213-255 E(4) of this chapter.

(1) Fees. The fee for political signs shall be one dollar ($1.) per sign.

(2) All political signs shall be soundly constructed and shall not exceed thirty-two (32) square feet in area.

(3) No such sign may be erected contrary to § 213-254, Sign standards, of this chapter. [**Amended 12-7-82 by Res. No. 14**]

B. Aviation signs. Directional signs for aviation purposes, painted on flat roofs, shall be permitted in any use district.

C. General sign standards:

(1) Content. Permitted signs shall indicate only the name or names of the establishment, occupants, the principal products or services available on the premises and the address.

(2) Measurement. Excluding structural supports from the ground to the bottom edge of the sign, the area of the sign shall be the area of a rectangle, the sides of which completely enclose the face of the sign. A sign may be double-faced and only one (1) face shall be included in the area measurement; however, if a sign is thicker than eighteen (18) inches, all sides shall be included in the area measurement. Setback measurement is to be measured from the closest point, excluding supports, of the sign structure.

(3) The height of a ground sign shall be measured vertically from grade to the top of the sign or its structural support, whichever is greater. **[Amended 12-7-82 by Res. No. 14]**

(4) The width of a building facing on a street shall be the distance between the two (2) perpendicular walls establishing the front wall of the premises.

(5) No sign shall be located in any street, private right-of-way or public right-of-way.

(6) Special exceptions. Except as provided in this Article, no sign shall be erected or placed upon any premises in any use district except as approved by the Board of Appeals as a special exception, in accordance with the standards and conditions provided in Article II of this chapter, and the fees hereinbefore provided, namely: fifty cents ($0.50) per square foot of sign area, but in no event less than the minimum of ten dollars ($10.). **[Amended 12-7-82 by Res. No. 14]**

(7) Display of permit number. All signs for which permits are required by the terms hereof shall at all times bear the assigned permit number prominently and per-

manently affixed on the face thereof. Failure to so affix the permit number shall constitute grounds for revocation of the permit by the Building Inspector, in addition to any other penalties or remedies prescribed by law.

(8) Access for inspection. In all instances where inspection of a sign is required in the discretion of the Building Inspector, the owner, the person in control of the premises upon which the sign is located or the holder of the sign permit shall provide the Building Inspector or his duly authorized agent with safe and adequate means of access to the sign, including, but ~~not~~ limited to, stairways, scaffolding or ladders.

D. Prohibited signs. The following signs are prohibited in any district:

(1) Any sign or artificial lighting source or reflector connected or to be used therewith, where such sign or lighting conflicts with or may be mistaken for a traffic signal.

(2) Any sign, painted, erected, affixed or maintained on the roof of a building or on any telephone, telegraph, electric or lighting pole, or on any traffic device, or on any tree, stone or other natural object.

(3) Illuminated signs or lighting devices outlining any part of a building including a gable roof, sidewalk or corner.

(4) Hazardous or dangerous. Any sign which is found hazardous or dangerous to the public safety by the Chief Building Inspector shall be a prohibited sign. Evidence of hazard or danger shall include, but not be limited to, signs larger than twelve (12) square feet swinging as a result of wind pressure or hazards to traffic or pedestrians or obstruction of any part of a window, door, ventilation system, fire exit or any means of ingress or egress. Such prohibited signs shall be removed in accordance with Subsection E hereof.

(5) Off-premises advertising. No sign shall advertise, refer to or call attention to any activity, business product or service not performed or connected with the property or building on which it is located.

(6) Morally offensive. The maintenance or erection of any sign which is deemed obscene or indecent by the Chief Building Inspector or his representative shall be prohibited. The owner of such a prohibited sign may seek review at a public hearing before the Town Board. Final decisions of the Town Board, if affirming a finding of moral offense, require compliance within three (3) days.

(7) Window signs. No premises may obstruct more than fifty percent (50%) of the total glass area of such premises.

(8) Any sign which uses breakable glass in its construction, except glass used in illumination. [Added 12-7-82 by Res. No. 14]

E. Removal of certain signs.

(1) Any sign now or hereafter existing which no longer advertises a bona fide business conducted or a product sold shall be taken down and removed by the owner, agent or person having the beneficial use of the building or structure, property or premises upon which sign may be found within thirty (30) days after written demand for removal by the Building Department. Upon failure to comply with such demand within the time specified, the Division of Building is hereby authorized to cause removal of such sign, and any and all expenses incidental thereto shall be paid by the owner of the building, structure, property or premises to which such sign is attached.

(2) Any sign for which a sign permit has been issued may be inspected for adequate maintenance, freedom from any hazardous condition and structural soundness. If such sign is found to be unsafe, the Building Inspector

shall suspend the sign permit until such time as a satisfactory adjustment has been made.

(3) No existing sign shall be structurally altered, rebuilt, enlarged, extended, relocated or modified in any way, except in conformity with the provisions of this section.

(4) Any sign requiring a sign permit which does not have such a permit, or which does not have a sign permit number displayed on its face, or which has had its permit revoked shall be deemed to be an illegal sign under the provisions of this chapter. The Building Inspector shall cause a notice of such violation to be served on the owner of the building, structure or lot where said sign is located or the lessee or tenant of the part of or of the entire building, structure or lot where said sign is located, requiring such owner or lessee or tenant to remove such illegal sign within seven (7) days. Such notice may be served personally or by certified mail, return receipt requested. Upon failure of such owner or lessee or tenant to remove said sign within seven (7) days of receipt of such notice, the Building Inspector is authorized to enter upon such property and remove any such illegal sign. No liability shall attach to the Town of Babylon nor to any officers, employees or agents of the Town of Babylon, except acts of affirmative negligence, in connection with the removal of any such illegal sign.

(5) Notwithstanding the foregoing provisions for notice of such violation, the provisions of §§ 1-15 through 1-17 of this Code shall be applicable to such violation at all times, including the time prior to the giving of said notice and during said seven-day period, and persons found guilty of such violation shall be subject to fine and/or imprisonment as set forth in §§ 1-15 through 1-17.

(6) In the interest of public safety, no sign other than a sign erected by a governmental agency shall be erected or placed within the right-of-way lines of a

public street. Any such sign may be removed by the Building Inspector without notice to the owner.

(7) All signs and devices which do not conform to this section shall be removed on or before December 31, 1982. Thereafter, the permit for each such sign shall be deemed to have expired. [**Amended 12-15-81 by Res. No. 3**]

D. The Building Inspector is hereby authorized in the exercise of reasonable discretion to revoke any permit issued hereunder if, after due investigation, he deems that the holder thereof has violated any provision of this ordinance or if the trailer or house car is being used in an unsafe manner. Written notice of said revocation shall be given by personal service or by certified or registered mail, return receipt requested.

E. The length of time a private trailer or house car shall be permitted to remain shall be six (6) months, with one (1) three-month extension. A further extension shall not be permitted, and it shall be mandatory that the private trailer or house car be removed at the end of the permitted period of time. If the private trailer or house car is not removed, there shall be a per diem civil penalty of fifteen dollars ($15.) for each day that it remains beyond the permitted period of time. If the private trailer or house car remains for more than ten (10) days beyond the permitted period of time, the Commissioner of the Department of Buildings, or his representative, shall, after notifying the owner of said private trailer or house car by registered or certified mail, return receipt requested, cause the private trailer or house car to be removed. The expense of removal and any resulting storage charges shall be paid by the owner of the private trailer or house car, and if said cost is not paid within ten (10) days, the Commissioner of the Department of Buildings may advertise for the public sale of the private trailer or house car in the official newspaper of the town and sell the private trailer or house car to the highest bidder at a public sale. The moneys realized from the sale shall be applied to any outstanding civil penalties and shall reimburse the town for any expense incurred in moving and storing the private trailer or house car. Any excess moneys shall be remitted to the original owner of the private trailer or house car.

ARTICLE XXIV
Signs
[Effective 1-1-72]

§ 242. Compliance required; variances.

A. No sign shall be permitted in any use district, except as provided in this Article or as authorized by the Board of Zoning Appeals.

B. When an application is filed with the Board of Zoning Appeals for permission to erect any sign which is not in accordance with provisions of this Article, the Board shall, prior to making a determination, take cognizance of:

(1) The character of the district.

(2) The existence, location, size and nature of other signs in the vicinity.

(3) Whether or not such sign is customarily essential to the primary use of the premises.

(4) Whether the construction or location of the proposed sign will interfere with necessary light or air or impair property or aesthetic values or otherwise endanger the health and welfare of the public.

(5) The purposes to which § 263 of the Town Law refers.

C. **[Effective 4-8-89]** This Article is intended for the purposes of controlling existing and proposed outdoor signs of all types by regulating size, location, quantity, quality, content and design in order to:

(1) Protect property values.

(2) Create a more attractive economic business climate.

(3) Enhance and protect the aesthetic environment of the town.

(4) Provide a more aesthetically and environmentally enjoyable and pleasing community.

(5) Reduce distractions to motorists caused by outdoor signs that may contribute to traffic accidents.

(6) Reduce obstructions to motorists caused by outdoor signs that may contribute to traffic accidents.

(7) Reduce hazards that may be caused by signs overhanging or projecting over public rights-of-way.

§ 243. Definitions.

The following definitions shall apply to this Article:

ANIMATED SIGN — A sign which depicts action or motion by flashing or otherwise, requiring electrical energy, electronic or other source of supply.

ARCADE — An arched or covered way that affords a common passageway to entrances of various shops or establishments along its course.

AREA OF SIGN — For the purposes of computation, the entire background area of the sign, and shall be computed by standard mathematical formulas for known or common shapes. For irregular shapes, lighting, devices, pennants, banners, bunting or fluttering devices, the entire background area shall be considered that area which is or would be encompassed within the extremeties of straight lines drawn closest to the extremities of the shape or device. For signs having lettering and/or pictorial matter on more than one (1) face, the sum of the entire background areas of each face shall be computed for determination of the required fee.

AWNING — An unenclosed roof structure supported entirely by the building to which attached and which may be of a stationary or retractable type.

AWNING SIGN — Any lettering attached to or inscribed on an awning.

CANOPY — A freestanding unenclosed roofed structure which may be connected to but not necessarily supported by the building or structure from which it extends.

CANOPY SIGN — Any lettering attached to or inscribed on a canopy, or any sign attached thereto.

COVERED MALL — For purposes of application of the requirements of this Article, the terms "arcade" and "covered mall" shall be considered synonymous.

DETACHED SIGN — Any sign which is suspended from or attached to and supported by one (1) or more columns, up-

rights or braces, imbedded in the ground, and in which neither the sign nor the supports thereof are attached to or are dependent on any building for support or bracing. "Detached signs" shall not exceed thirty-two (32) square feet in area on each face, and the bottom shall not be less than seven (7) feet nor the top more than fifteen (15) feet above the adjacent ground level unless otherwise specifically stated in this Article.

DIRECTIONAL SIGN — Any sign which is located outdoors and is used for guidance, instruction or direction.

DOUBLE-FACED SIGN — A sign having its opposite surface areas used in any manner described under the definition of "sign" in this section of this Article.

ERECT — To build, reletter, construct, alter, repair, display, relocate, attach, hang, place, suspend, affix or maintain any sign, and shall include the painting of signs directly on exterior surfaces of buildings or structures.

FACADE — That part of the exterior face of a building, the top of which is more than three (3) feet but not in excess of six (6) feet above the roofline of the building.

(Cont'd on page BZ-137)

FACADE SIGN — Any sign erected on a facade that does not:

A. Exceed one-third (1/3) the area of the facade.

B. Exceed in length ninety percent (90%) of the horizontal measurement of each tenant's wall space.

C. Project more than twelve (12) inches beyond the exterior face of the building, including any artificial lighting or reflectors connected thereto.

ILLUMINATED SIGN — A sign which is illuminated by an artificial source of light to make the message more discernible, and shall include internally and externally lighted signs.

LIGHTING DEVICE — Any nonintermittent source of light, string or group of lights located or arranged to cast illumination on a sign or which is used to attract the attention of the public to the premises.

MARQUEE — A permanent roofed structure which is either wholly or partially supported by the building to which it is attached and projects over public or private property.

MARQUEE SIGN — Any sign which is attached to, inscribed on or constructed in a marquee.

MOBILE SIGN — A sign mounted upon a trailer-type steel chassis, not permanently anchored to the ground, and capable of being transported as a unit over public roads and streets. A "mobile sign" may be designed to accommodate changeable copy and may be illuminated. The maximum height from the top of a "mobile sign" to the ground shall not exceed fifteen (15) feet. Such sign may be single- or double-faced, but the total sign area shall not exceed sixty-four (64) square feet per face.

MULTIFACED SIGN — At least three (3) or more single-faced signs, of the same size, the vertical sides of which are substantially fastened to each other to form a continuous sign area and securely mounted or affixed to a pole or post which is imbedded in the ground. The bottom of such signs shall be parallel to the ground and equidistant therefrom.

NONCONFORMING SIGN — Any sign which does not comply with the provisions of this Article as to size, type, character or location as may be permitted in the use district in which such sign is erected.

POSTER SIGN — A sign which is affixed to a surface by the use of an adhesive.

PROFESSIONAL SIGN — A sign used to designate a professional office located on the premises. The wording on the sign shall be limited to the name, title, profession, location, telephone, type of service and the time available for such services by the named practitioner.

PROJECTING SIGN — Any sign which extends more than twelve (12) inches horizontally from an exterior wall of a building or structure to which it is attached. Such sign shall:

A. Not project more than forty-two (42) inches from the wall.

B. Not be erected closer than eight (8) feet to the curbline.

C. Not extend above the roofline or top of the parapet of the wall to which attached, nor shall any of its supporting structures.

D. Have a minimum clearance of ten (10) feet above the finished grade of a walk directly beneath and a minimum clearance above a road or driveway of at least eighteen (18) feet.

REVOLVING SIGN — Any sign which revolves about an axis.

ROOF SIGN — Any sign which is painted on or is erected upon or above a roof of a building except a facade sign as defined elsewhere in this Article.

SIGN — Any material, structure, device, or any part thereof, which consists of lettered or pictorial matter, or upon which lettered or pictorial matter is placed when located outdoors or on the exterior face of a building or on the inside or outside surface of a window when used for display, advertisement, announcement, notice, directional matter or name, and shall

include sign frames, posters, billboards, signboards, painted wall signs, lighting devices, hanging signs, illuminated signs, pennants, banners, bunting, fluttering devices, projecting signs, ground signs or other signs as defined in this Article, and shall also include any announcement, declaration, demonstration, display, illustration or insignia used to advertise or promote the interests of any person or business or attract the attention of the public when the same is placed or located within its view.

SWING OR CURB SIGN — A double-faced free-swinging sign not exceeding twelve (12) square feet in area per face, suspended from an independent metal frame whose base rests on the ground and provides the only support for such sign.

TEMPORARY SIGN — A sign which is permitted to be used or erected for a limited period of time pursuant to the provisions of this Article.

WALL SIGN — Any single-faced sign which is attached to, incorporated into or painted on the exterior wall of the premises abutting a public street or a public or private parking field advertising only the business conducted on the premises, when such sign does not:

A. Exceed two (2) square feet in area for each horizontal foot of such wall.

B. Exceed in length ninety percent (90%) of the horizontal measurement of each tenant's wall space.

C. Project above any portion of the roof of the building except if such sign is attached to a parapet wall, which does not exceed three (3) feet in height, and the sign does not extend above the top thereof.

D. Project more than twelve (12) inches from such wall, including any artificial lighting or reflectors connected thereto.

E. Include the wall area considered in the computations for any facade sign.

WINDOW SIGN — A sign which is either temporarily or permanently attached or affixed to the interior or exterior surface of a display window and is used for advertisement, announcement, or notice, directional matter, company name or trade name which is relative to the business, products or services provided. The total sign area shall not exceed one-fourth (¼) the area of such window unless otherwise stated in this Article.

§ 244. Signs permitted in specific use districts.

A. The following signs shall be permitted in all use districts, except Edu-Cultural (E), Golden Age (GA) and in those districts specifically excluded by this Article:

(1) Without a permit:

(a) Professional sign: one (1) wall sign not exceeding one (1) square foot in area listing only the name and profession of each resident practitioner.

(b) Religious sign: one (1) wall sign and one (1) single- or double-faced detached sign, when erected on the premises of the place of worship.

(c) Sale or rent sign: one (1) wall sign, not exceeding one (1) square foot in area, advertising only the sale, lease or rental of the premises upon which the sign is erected.

(d) Name and address sign: one (1) wall sign denoting name and or address of the occupants of the premises when such sign does not exceed twenty-four (24) square inches for each occupant.

(e) Interior sign: only when located within a building or structure and not positioned for observation from the exterior.

(f) Information sig[illegible]

[1] One (1) wall sign and one (1) single- or double-faced detached sign for museums, libraries, pub-

lic schools or parochial schools when located on the premises thereof, or by governmental agencies when displayed for the safety of the public or for public notices when such notices are required by law.

[2] One (1) wall sign, not exceeding twelve (12) inches in maximum dimension, shall be permitted for designating the location or direction of public telephones, drinking fountains or sanitary facilities.

(g) Canopy sign: one (1) row of lettering and/or numbers shall be permitted on each of three (3) sides and shall be limited to the name of the premises and the house numbers. All lettering and/or numbers shall be painted or applied directly to the sides or front of the canopy and shall not exceed eight (8) inches in height, nor shall the bottoms of such lettering and/or numbers be located more than two (2) inches from the lowest part of the sides or front of the canopy or their valances, if any, and shall be parallel thereto. Lettering and/or numbers shall not be located on any other part of such canopy. Such signs shall not be permitted in Residence (A), (B), (C) or Marine Residence (MA) Districts.

(h) Notwithstanding any prior or subsequent provisions of this Article, any sign authorized in this ordinance, Article or section is allowed to contain noncommercial copy in lieu of any other copy. Any provision authorizing commercial copy may be read so as to authorize noncommercial copy in lieu thereof. **[Effective 4-8-89]**

(2) Upon issuance of a permit:

(a) Professional sign:

[1] If used by only one (1) resident practitioner, it shall be limited to one (1) single- or double-faced detached sign, not exceeding four (4)

square feet in area per face with the top of such sign not more than six (6) feet above the adjacent ground level.

[2] If used by more than one (1) resident practitioner, it shall be limited to one (1) single- or double-faced detached sign not exceeding one (1) square foot in area for each resident practitioner. However, the total area of each face of such sign shall be limited to ten (10) square feet, with the top of such sign not more than six (6) feet above the adjacent ground level.

(b) Subdivision and acreage signs: one (1) single- or double-faced detached sign shall be permitted for each subdivision or parcel and shall advertise only the premises upon which erected.

(c) Development directional sign: one (1) single- or double-faced detached sign for each subdivision may be erected on property other than that of the owner or developer, advertising only the name and direction of such subdivision. Written consent of the owner of real property upon which the sign is to be erected must be submitted prior to issuance of the permit, and such owner shall assume the responsibility for subsequent removal of the sign upon termination of the permit.

(d) Construction or occupancy sign:

[1] One (1) temporary wall sign or one (1) temporary single- or double-faced detached sign, or one (1) temporary single-or double-faced swing or curb sign shall be permitted on the premises where construction, repair or renovations are in progress and shall display only the name, profession, address and telephone number of the contractor, builder, owner, architect and engineer associated with the project. The sign shall be removed by the permittee upon issuance of a certificate of occupancy or a certificate of completion for the project.

[2] One (1) temporary wall sign or one (1) temporary single- or double-faced detached sign shall be permitted for each building or structure under construction, repair or renovation. Such sign shall advertise only the name, business or profession of future tenants, and the date of expected occupancy. The sign shall be removed

(Cont'd on page BZ-143)

by the permittee upon issuance of a certificate of occupancy or a certificate of completion for the project.

(e) Sale or rent sign: only one (1) single- or double-faced detached sign, not exceeding eight (8) square feet in area per face, or a projecting sign, not exceeding two (2) square feet in area nor extending more than thirty (30) inches from the wall to which attached. Such sign shall also comply with all other provisions of the definition of "projecting sign" in § 243 of this Article.

B. The following signs shall be permitted in Residence (CA), Golden Age Residence (GA) and Mitchel Field Hotel (MFH) Districts:

(1) Upon issuance of a permit:

(a) Identification sign:

[1] One (1) wall sign or one (1) single- or double-faced detached sign, neither of which exceeds four (4) square feet in area per face, shall be permitted for each building, provided that such sign is used for listing the name and/or address of the premises only.

[2] Where three (3) or more Residence (CA) or Golden Age Residence (GA) District buildings are part of a complex of similar buildings, one (1) single- or double-faced detached sign, not exceeding eight (8) square feet in area per face, shall be permitted in a centrally located area on the premises, provided that such sign shall list only the name, number, location and direction of each building in the complex for identification, but may include a sketch of the physical location of each such building.

(b) Directional sign: one (1) pair of wall signs or one (1) pair of single- or double-faced signs, per curb cut, none of which exceeds two (2) square feet in area

per face, may be erected to indicate the flow of vehicular traffic. The tops of such signs shall not exceed a height of seven (7) feet above the adjacent ground level and shall have only the words "Entrance" or "Exit," as applicable, imprinted thereon, except for an arrow indicating the direction of travel. No part of any sign shall extend beyond the property line.

C. The following signs shall be permitted in Edu-Cultural (E) and Mitchel Field Hotel (MFH) Districts:

(1) Without a permit:

(a) Professional sign pursuant to Subsection A(1)(a) of this section..

(b) Religious sign pursuant to Subsection A(1)(b) of this section.

(c) Sale or rent sign pursuant to Subsection A(1)(c) of this section.

(d) Name and address sign pursuant to Subsection A(1)(d) of this section.

(e) Interior sign pursuant to Subsection A(1)(e) of this section.

(f) Information sign:

[1] One (1) wall sign or one (1) single- or double-faced detached sign, neither of which exceeds four (4) square feet in area per face, shall be permitted for each building, provided that no advertising matter is displayed thereon and such sign is used for the information and general welfare of the public.

[2] Single- or double-faced detached signs may be located in public areas and erected pursuant to the definition of "detached sign" in § 243 of this Article. They shall be used for the dissemination of information for the guidance of pub-

lic. and all signs to be erected must appear on the approved site plan.

(2) Upon issuance of a permit:

(a) Professional sign pursuant to Subsection A(2)(a) of this section.

(b) Construction or occupancy sign pursuant to Subsection A(2)(d) of this section.

(c) Institutional identification sign. Each wall sign or detached sign shall be dimensioned, located and accepted as part of the approved site plan.

(d) Directional sign: one (1) single- or double-faced detached sign not exceeding eight (8) square feet in area listing the name, location and direction of any of the uses permitted. Such sign shall be located only along service roadways which afford access to the building from the public streets. Signs shall be positioned not closer than one hundred (100) feet to an intersecting roadway or walk.

(e) Identification sign: one (1) wall sign or one (1) single- or double-faced detached sign, neither of which exceeds four (4) square feet in area per face, provided that such sign is used for listing the name and/or address of the premises only.

D. All signs to be erected in Edu-Cultural (E) and Mitchel Field Hotel (MFH) Districts shall require a permit from the Commissioner of Buildings except as permitted in Subsection C(1) of this section.

E. In addition to those signs prohibited by § 246 of this Article, the following shall also be prohibited in Edu-Cultural (E) and Mitchel Field Hotel (MFH) Districts:

(1) Any sign painted or stenciled on the wall or roof of any building or structure.

(2) Any sign consructed of cloth, oilcloth, paper or any other material subject to disintegration.

(3) Any sign placed in any required yard or street.

(4) Any billboard, poster panel, outdoor advertising or display sign which directs attention to a business, service, entertainment or commodity which is conducted, sold or offered elsewhere than upon the premises.

F. The following signs are permitted in Business (X), Light Manufacturing (LM), Industrial (Y), Marine Commercial (MB), Marine Recreation (MC) and Marine Resort (MD) Districts, unless otherwise stated:

(1) Without a permit:

(a) Window sign: Signs shall be permitted in each display window, provided that the total area of all signs used or displayed in such window does not exceed one-fourth (¼) the area of the window.

(2) Upon issuance of a permit:

(a) Detached sign: one (1) single- or double-faced detached sign shall be permitted and shall advertise only the business, products or services provided on the premises.

(b) Wall sign: one (1) wall sign shall be permitted for each tenant space, advertising only the business conducted in such tenant space, when such sign is erected pursuant to the definition of "wall sign" in § 243 of this Article.

(c) Directional sign:

[1] One (1) single- or double-faced detached sign not exceeding eight (8) square feet in area, listing the name, location and direction of any of the uses permitted. Such sign shall be located only along private service roadways which afford access to the buildings from public streets. Signs shall be positioned not closer than one hundred (100) feet to an intersecting roadway or walk.

[2] One (1) pair of wall signs or one (1) pair of single- or double-faced detached signs, per curb cut, none of which shall exceed two (2) square feet in area, may be erected to indicate the flow of vehicular traffic. The tops of such signs shall not exceed a height of seven (7) feet above the adjacent ground level and shall have only the words "Entrance" and "Exit," as applicable, imprinted thereon, but may have an arrow indicating the direction of travel. No part of any sign shall extend beyond the property line.

(d) Multifaced or double-faced detached sign: On off-street on-premises parking areas, in Business (X) Districts only, one (1) multifaced or double-faced detached sign, as defined in § 243 of this Article respectively, may be erected for each one hundred (100) car spaces provided. Signs shall be limited to advertising products sold, services performed, hours of operation, or prizes, gifts or contests available to the customers. The total face area of each permitted sign shall not exceed thirty-two (32) square feet. Where conditions permit the erection of more than one (1) sign, additional signs shall be placed equally distant throughout the parking area. The bottoms of such signs shall be located not less than seven (7) feet nor more than eight (8) feet above the adjacent ground level. Signs shall be installed and protected so as not to interfere with nor impede vehicular or pedestrian traffic.

(e) Window sign: The total sign area allowed for each display window may be in excess of that permitted by Subsection F(1) of this Article, provided that the total area utilized does not exceed one-half (½) the area of such display window and a temporary sign permit is secured, which shall include all signs displayed on such window. The fee for such temporary sign permit shall be computed on the total combined area of all signs displayed on such window.

(f) Temporary sign: signs of a temporary nature such as pennants, banners, bunting, fluttering devices or window signs requiring permits shall be permitted, provided that they are used for on-premises promotional advertising and shall be subjected to the time limitations and fee requirements set forth in § 247 of this Article.

(g) Awning sign; canopy: One (1) sign for each premises shall be allowed, provided that only one (1) row of lettering and/or numbers shall be permitted on each of three (3) sides and shall be limited to the name of the premises and the address numbers. All lettering and/or numbers shall be painted or applied directly to the sides or front of the awning and shall not exceed eight (8) inches in height, nor shall the bottoms of such lettering and/or numbers be located more than two (2) inches from the lowest parts thereof or their valances, if any, and parallel thereto. Lettering and/or numbers shall not be permitted in any other location.

(h) Mobile sign:

[1] Only one (1) such sign shall be permitted on the same premises at the same time.

[2] Signs shall advertise only the business, product or specific sale or event associated with a business located on such premises, except that a sign may be used for political advertising only in Business (X), Light Manufacturing (LM), Industrial (Y) or Marine Commercial (MB) Districts.

[3] Signs shall not be located on the same premises for a continuous period in excess of thirty (30) days, nor shall the intervening period between successive placement of this type of a sign on the same premises be less than fifteen (15) consecutive days. Political signs shall be permitted

only within the thirty-day period immediately preceding the date of an election.

[4] The Commissioner of Buildings may, in his discretion, extend the time limitation set for the location of such sign for an additional period not to exceed ten (10) days. He may also decrease the time interval between successive placements of such signs. An extension of time shall not be considered for political signs.

[5] All signs shall be removed from the premises within forty-eight (48) hours after the expiration date, unless otherwise permitted by the Commissioner of Buildings.

[6] Signs shall be subject to all provisions of this Article and to all zoning regulations applicable thereto.

(i) Marquee sign:

[1] Subject to the approval of the Town Highway Division, marquee signs may be permitted to extend beyond the street line and across the sidewalk to within two (2) feet of the curbline, provided that the bottoms thereof are not less than ten (10) feet above the curb level at all points.

[2] Signs which are an integral part of or attached to the vertical sides of a marquee shall not exceed the linear length, nor height of the vertical sides, of such marquee.

(j) Poster sign:

[1] Only one (1) such sign shall be permitted on the same premises at the same time.

[2] It shall be mounted on a poster panel or as otherwise approved by the Commissioner of Buildings.

[3] Signs permitted to be mounted other than on poster panels shall be limited to Business (X), Light Manufacturing (LM), Industrial (Y) or Marine Commercial (MB) Districts.

[4] Signs shall not be located on the same premises for a continuous period in excess of thirty (30) days.

[5] Signs shall be removed from the premises within forty-eight (48) hours after the expiration date, unless otherwise permitted by the Commissioner of Buildings.

(k) Facade sign: One (1) facade sign shall be permitted on each exterior face of the building, provided that it is in compliance with the definitions of "facade" and "facade sign" in § 243 of this Article.

(l) Identification sign:

[1] One (1) wall sign or one (1) single- or double-faced detached sign, neither of which exceeds four (4) square feet in area per face, shall be permitted for each building, provided that such sign is used for listing the name and address of the premises only.

[2] Where three (3) or more buildings are part of the same complex, one (1) single- or double-faced detached sign, not exceeding eight (8) square feet in area per face, shall be permitted in a centrally located area on the premises, provided that such sign shall list only the name, number, location and direction of each building in the complex for identification, but may include a sketch of the physical location of each such building.

(3) The bottoms of all signs, other than projecting or marquee signs, extending over a sidewalk, parking areas or mall shall be not less than seven (7) feet above such sidewalk, parking areas or mall.

(4) One (1) single- or double-faced sign may be attached or suspended from soffit or ceiling of an arcade or covered mall, or attached to the face of a wall fronting thereon, for each store or establishment along its course. No permit shall be required if such sign does not exceed six (6) inches in vertical nor eighteen (18) inches in horizontal dimension. All such signs must be: substantially secured by brackets or chains; located directly in front of the entrance to the establishment and perpendicular thereto; constructed of noncombustible material or of opalescent material if internally illuminated, and then only by not more than a forty-watt fluorescent bulb. The sign shall contain only the name of the business, trade or establishment.

G. Only the following signs shall be required and permitted at gasoline filling and service stations: signs for the advertisement of selling price of gasline at individual pumps to be used by gasoline filling and service stations. It shall be unlawful for any person, firm or corporation to sell or offer for sale at retail for the use in internal combustion engines in motor vehicles any gasoline or diesel fuel unless said seller shall post and keep continuously posted on the individual pump, or other dispensing device, from which such gasoline or diesel fuel is sold, or offered for sale, a sign or placard, single- or double-faced, twelve (12) inches in height and twelve (12) inches in width, stating clearly and legibly in whole-cent numerals, at least nine (9) inches in height and two (2) inches in width, the selling price of the gasoline. Such sign shall also indicate the federal, state and local taxes included in such selling price per gallon. The name brand and grade of quality classification of the gasoline or diesel fuel offered for sale shall be permanently imprinted on the dispensing device. **[Effective 9-4-78]**

§ 245. Setback requirements. [Effective 5-20-74]

All signs erected or used pursuant to this Article shall comply with the following requirements unless otherwise specifically stated.

A. Any part of such sign shall be located:

(1) Not less than five (5) feet from any property line when erected pursuant to § 244G.

(2) Not less than ten (10) feet from any property line when erected pursuant to § 244G or to § 244A, except Subsections A(1)(e) or (g) or A(2)(b) or (c).

(3) Not less than twenty (20) feet from any property line when erected as a multifaced sign or detached sign, except a directional sign erected pursuant to § 244F(2)(c)[2] or a sign erected or used pursuant to § 244G; provided, however, that if the average front setback of the existing buildings on the same side of the street, within the same block, is less than ten (10) feet, then not less than ten (10) feet from any property line.

(4) Not less than twenty (20) feet from any property line when erected pursuant to § 244A(2)(c).

(5) Not less than thirty (30) feet from any property line when erected pursuant to § 244A(2)(b).

B. No signs shall be erected or maintained on any corner lot at intersecting streets which may interfere with traffic visibility across the corner.

§ 246. General provisions.

The following provisions shall apply to all signs:

A. Temporary signs.

(1) Each temporary sign permitted under this Article shall require a temporary sign permit, which shall be subject to the fee and time limitation as prescribed by this Article.

(2) All temporary sign permits, including those for pennants, banners, bunting, fluttering devices, posters, promotional devices, window signs or other signs of similar character, shall be issued for a period not in excess of thirty (30) days, unless otherwise stated in this Article.

(3) The Commissioner of Buildings, at his discretion, may renew a temporary sign permit for additional periods of thirty (30) days, provided that a fee, equivalent to the original, is paid upon application for each such renewal.

(4) In addition to the payment of the stipulated fee for a temporary sign permit, an amount equivalent to the fee shall be deposited with the Commissioner of Buildings prior to issuance of the temporary sign permit, to assure removal of such sign in accordance with provisions of § 250 of this Article, upon expiration of the permit. The minimum deposit required for each temporary sign permit shall be ten dollars ($10.). Where two (2) or more temporary sign permits are issued to the same time period, the Commissioner of Buildings, at his discretion, may reduce the total amount of deposit required, but in no event shall the total of such deposit be less than ten dollars ($10.). Upon satisfactory removal of a sign, for which a deposit was withheld, the Commissioner of Buildings shall release such deposit to the permittee.

(5) After expiration of the temporary sign permit, the sign associated with such permit shall be removed. If such sign is not removed, the Commissioner of Buildings shall give ten (10) days' written notice to the permittee to remove such sign, and, upon failure to comply with this request within such time limitation, it shall be considered due cause for the Commissioner of Buildings to have such sign removed and the deposit forfeited to help defray the expenses involved in such removal.

B. Signs shall not be attached to fences, trees, utility poles or similar supporting devices, or to vacant or unoccupied structures, nor be located so as to obstruct the vision of pedestrian or vehicular traffic or create a hazard or disturbance to the health and welfare of the general public.

C. Signs which directly emit, radiate or reflect any beam, ray or glare away from any lot or premises upon which they are erected or used or which are in motion by any means or have flashing or intermittent illumination or changing degrees of

intensity or are animated shall not be permitted in any district.

D. Whenever a sign cannot be readily classified under this Article, the Commissioner of Buildings shall determine such classification for the purpose of applying the use restrictions, fees, time limitations, etc., as may be required for similar signs.

E. Any sign which is not permitted by this Article shall be subject to approval by the Board of Zoning Appeals prior to issuance of a permit by the Commissioner of Buildings.

F. It shall be the responsibility of the Commissioner of Buildings to have all signs which, in his opinion, appear hazardous, unsafe or insecure to be made safe, substantially secured or removed.

G. Nonconforming signs.

(1) Signs erected prior to the effective date of this Artiele for which sign permits are presently in effect and which do not conform to the provisions or standards of this Article shall be granted the permits required by this Article if, in the opinion of the Commissioner of Buildings, such signs and their supports and appurtenances appear to be in a safe condition. All such permits granted shall terminate on January 1, 1973, at which time or prior thereto the signs shall be altered, removed or replaced to conform to the provisions of this Article unless a variance has been granted by the Board of Zoning Appeals.

(2) Signs for which permits are in effect that become nonconforming by a subsequent amendment to this Article after the effective date hereof may be continued for three (3) years after the effective date of adoption of the amendment making such use nonconforming and after said date such nonconforming signs shall be removed and the use terminated unless a variance therefor has been granted by the Board of Zoning Appeals.

(3) Signs erected prior to the effective date of this Article and for which no sign permits are in effect and which do not conform to the provisions or standards of this Article

shall be removed within thirty (30) days after the effective date of this Article.

H. Erection of new signs or maintenance of signs previously erected, other than those permitted by this Article, in the designated use districts, shall be prohibited unless a variance is or has been granted by the Board of Zoning Appeals.

I. No sign shall hereafter be erected, altered, repaired, replaced or relocated until a sign permit, as may be required by this Article, has been issued by the Commissioner of Buildings. A separate permit shall be required for each sign affected.

J. If a sign is currently in effect, the following conditions shall not require a new or additional permit:

(1) To replace or alter changeable copy on a theater marquee and similar signs designed for use of changeable copy and so designated in the permit.

(2) To change or advertise copy or message on a painted or printed sign only.

(3) To paint, clean, maintain or make minor repairs or replacements to existing parts which are not considered structural changes.

(4) To remove and replace window signs with different copy, provided that all other applicable conditions, relative to the former signs, are adhered to.

K. No sign shall cover any door, window or required opening or hinder or prevent free and accessible ingress or egress to or from any door, fire escape or stairway of any building.

L. The erection, alteration, repair, replacement or relocation of any sign for which a permit has been issued shall commence within thirty (30) days of issuance and shall be completed within sixty (60) days of issuance of such permit. A sign permit shall be automatically canceled if work does not commence or is not completed pursuant to the foregoing time limitations.

M. All signs erected pursuant to the issuance of a permit shall bear the current permit number or other identification, as

may be required by the Commissioner of Buildings, prominently and permanently affixed to a face thereof which is exposed to public view.

N. All signs permitted by this Article shall also be subject to the requirements of other governmental agencies having jurisdiction.

O. No sign or any portion thereof shall project out, over or into a sidewalk, parking area or mall unless the lowest portion of such encroachment is at least seven (7) feet in height above such sidewalk, parking area or mall except as otherwise stated in this Article.

P. The physical dimensions of all signs, except those for which a variance has been granted by the Board of Zoning Appeals, may be modified, increased and/or their minimum and maximum heights above ground level varied, as the case may be, by the Commissioner of Buildings, provided that such deviation is restricted to a maximum of fifteen percent (15%) above or below the specific limitations set by this Article.

(1) Any modification granted by the Commissioner of Buildings, pursuant to this section, shall terminate upon expiration of the sign permit associated with such modification.

(2) All signs shall be restored to and shall comply with all requirements of this Article upon expiration of any modification granted by the Commissioner of Buildings.

(3) The definition of "area of sign" in § 243 of this Article shall be used for computing the required fees for all signs requiring a permit, including those dimensions which have been increased because of a modification granted by the Commissioner of Buildings under the provisions of this section.

Q. Nothing shall be attached to or suspended from any sign erected pursuant to this Article.

R. Any sign which no longer advertises the existing business or the product sold on the premises, nor serves the purpose for which the permit was issued or for which the permit has ex-

pired, or is not compatible with the use permitted by this Article shall be removed pursuant to § 250.

S. Signs shall not be painted on the exterior wall surface of any building or structure. All such signs subject to the requirements of Subsection R of this section shall be removed. Existing signs painted on the exterior wall surface of any building or structure shall be obliterated prior to January 1, 1974.

T. No permit shall be issued hereafter for any sign in which the wood portions thereof or any wood supporting structural members have not been painted or treated to resist decay. Existing signs which do not conform to the requirements of this section shall be similarly treated or removed prior to January 1, 1973, unless such date is extended by the Commissioner of Buildings.

U. All electrical fixtures, motors, receptacles, wiring or other devices or appurtenances used for the illumination or operation of signs shall be of an approved type and shall be installed in accordance with the requirements of the National Electrical Code.

§ 247. Permit required; fees.

A. The following fees shall apply to all signs requiring permits:

(1) No sign authorized by the Board of Zoning Appeals or subject to a permit required by this Article shall be erected or maintained until a permit, or the renewal of an existing permit, is issued by the Commissioner of Buildings, subject to the payment of a fee, every three (3) years, in the amount of seventy-five cents ($0.75) per square foot, or fraction thereof, for each face of the sign used. The minimum fee, every three (3) years, for each sign requiring a permit, shall be fifteen dollars ($15.), except as otherwise stated in this Article. **[Effective 7-1-79]**

(2) Each mobile sign shall be subject to the provisions of Subsection B of this section and all other applicable fee provisions of this Article. However, an additional fee of

two dollars ($2.) shall be required for each relocation of such sign to compensate for the inspection services necessitated by the relocation. The permittee of the mobile sign shall keep the Commissioner of Buildings currently informed of the relocation of such sign.

(3) All signs shall be subject to the provisions of this Article, except that fees only may be waived for signs used for religious, charitable, eleemosynary or educational purposes when owned and located on the premises occupied by such institution or when such sign is used by federal, state or municipal governments.

(4) Temporary sign permits shall be issued for approved construction or occupancy signs. Such signs shall be removed upon issuance of a certificate of occupancy or a certificate of completion for the project. The signs may be relocated to other job sites, subject to the same conditions outlined herein, provided that the Commissioner of Buildings is notified prior to each subsequent relocation of the signs. Such temporary sign permits shall expire not later than six (6) months from the date of issuance, and the annual fee for each temporary permit shall be twenty-five cents ($0.25) per square foot or fraction thereof for each face of the sign used. The minimum annual fee for each sign requiring a permit shall be ten dollars ($10.). **[Effective 7-1-79]**

(5) Temporary sign permits issued for other than construction and occupancy signs shall expire not later than thirty (30) days from the date of issuance, and the fee for each temporary permit shall be equivalent to the annual fee computed pursuant to Subsection A(4) of this section. **[Effective 7-1-79]**

B. All sign permits, unless otherwise stated, shall terminate one (1) year from the date of issuance and shall be renewable, if in compliance with this Article, upon payment of the required annual permit fee. All existing signs authorized by the Board of Zoning Appeals and those hereafter authorized by such Board shall be subject to the permit and annual fee requirements of this Article.

C. All signs which are illuminated, either directly or indirectly, by other than natural daylight, shall require an additional permit fee of five cents ($0.05) per square foot, or fraction thereof, for each side illuminated. This fee shall be payable at the same time, in the same manner and for the same period as required for sign permits and renewals thereof. Subsequent illumination of existing signs shall be subject to the fee which would have been required had such illumination been provided at the same time of issuance of the sign permit or from the date of the last renewal thereof and shall terminate upon expiration of the sign permit. Future renewal of a permit for sign illumination shall coincide with the renewal date of the sign permit, and the required fee shall be payable at such time and for such period.

D. Upon filing an application for a sign permit, the Department of Buildings shall require the applicant to pay fifty percent (50%) of the estimate of all fees related to the sign permit. Such fees shall not be refunded if the application for the permit is not approved.

E. If a permit is revoked, canceled or automatically terminated pursuant to this Article or the application is withdrawn or disapproved, the applicant shall not be entitled to a refund of any fee paid in connection therewith.

F. The following fees shall be payable to the Board of Zoning Appeals upon application to such Board for a variance from the requirements of this Article:

(1) Application to obtain a detached sign one hundred (100) square feet or less, either single- or double-faced: one hundred twenty-five dollars ($125.).

(2) Application to obtain a detached sign exceeding one hundred (100) square feet, either single- or double-faced: two hundred dollars ($200.).

(3) Application to obtain a wall sign one hundred (100) square feet or less: one hundred twenty-five dollars ($125.).

(4) Application to obtain a wall sign more than one hundred (100) square feet: two hundred dollars ($200.).

(5) Application to obtain a roof sign: two hundred fifty dollars ($250.).

(6) Application to obtain a renewal of a variance previously granted for a sign permit: one hundred dollars ($100.).

§ 248. Revocation of permit.

Any of the following conditions shall constitute justifiable cause for revocation of permits by the Commissioner of Buildings:

A. If a sign does not bear the required permit number or other required markings prominently and permanently affixed on the face thereof.

B. If any new or existing sign shall hereafter be erected or altered contrary to the provisions of this Article.

C. If any sign is not maintained in a clean manner, neatly painted, free from all hazards including faulty wiring, loose or defective fastenings or, in the opinion of the Commissioner of Buildings, appears to be in an unsafe condition or which presents a potential hazard to the public health or safety.

D. If any sign no longer advertises an existing business or product sold on the premises.

§ 249. Compliance.

If any sign is erected, installed or maintained in violation of any provision of this Article, the Commissioner of Buildings shall notify, by registered mail, the owner or lessees of the property upon which such sign is located to alter such sign to comply with this Article and/or secure the necessary permit or remove the sign. If such order is not complied with within ten (10) days from the date of receipt of the notification, any sign permit presently in effect shall be automatically revoked, and the Commissioner of Buildings shall determine such sign an illegal sign, and removal thereof shall be made pursuant to applicable provisions of § 250 of this Article.

§ 250. Removal of signs; penalties for offenses.

A. Regardless of any other penalty otherwise prescribed in the Building Zone Ordinance of Town of Hempstead for an infraction of any provision therein, any sign which is not in compliance with the provisions of this Article, or for which a sign permit has been revoked or expired, shall be removed by the owner of the property upon which such sign is located within ten (10) days after date of the notice, unless otherwise stipulated in such notice.

B. Upon failure to remove such sign within the prescribed time set in the notice, said owner shall be guilty of a violation punishable by a fine not exceeding two hundred fifty dollars ($250.) or by imprisonment for a period not to exceed fifteen (15) days, and each day's continued failure to correct such violation shall constitute a separate additional violation.

ARTICLE XXV
Swimming Pools

§ 251. Installation allowed; conditions. [Effective 4-19-76; 10-31-87]

Swimming pools may be installed in A. AA. A1. A2. B. BB. C. CA and LPRD Residence Districts only as accessory to a dwelling for private use of the owners or occupants of such dwelling and their families and guests, or as accessory to a nursery school or day camp for children, and only on the conditions provided in this Article.

§ 252. Conditions for installation and maintenance.

A. No outdoor swimming pool shall be installed or maintained unless:

(1) Such pool is installed in the rear yard of the premises.

(2) There shall be erected and maintained a swimming pool fence enclosing the portion of the area upon which such pool shall be installed. Such fence shall be either a chain link fence or a quality timber stockade fence in accordance with the following specifications:

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-159 (2)

IN THE

Supreme Court of the United States

October Term, 1990

TOWN OF BABYLON

and

TOWN OF HEMPSTEAD,

Petitioners,

- against -

NATIONAL ADVERTISING COMPANY, INCORPORATED VILLAGE OF LINDENHURST, TOWN OF OYSTER BAY, INCORPORATED, VILLAGE OF FREEPORT, and TOWN OF ISLIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT NATIONAL ADVERTISING COMPANY'S BRIEF IN OPPOSITION

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August 27, 1990

QUESTION PRESENTED FOR REVIEW

Does a municipality seeking to uphold an ordinance restricting constitutionally protected speech carry its burden of justifying that restriction when it offers neither statutory nor extrinsic evidence of any governmental interest the ordinance may have been intended to advance?

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LIST OF AFFILIATED CORPORATIONS

Minnesota Mining and Manufacturing ("3M") Company is the parent corporation of National Advertising Company. National Advertising Company does not have any subsidiary companies.

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COUNTER-STATEMENT OF THE CASE

This case involves the patent unconstitutionality of sign ordinances of the New York towns of Babylon and Hempstead ("Petitioners") restricting "off-premises" advertising. National Advertising Company ("National"), believing that both ordinances contained the constitutional infirmities afflicting the billboard ordinance reviewed by this Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), filed a complaint under 42 U.S.C. § 1983 seeking a declaratory judgment and permanent injunction against the enforceability of each ordinance.

Neither ordinance gave any indication of the governmental interests it sought to advance. Moreover, despite the opportunity afforded by a hearing on a preliminary injunction and a subsequent request by the district court for additional submissions upon conversion of the motion into one for summary judgment, neither Petitioner offered any extrinsic evidence that it actually intended to advance any governmental interest when it passed its ordinance.

The Second Circuit, having been asked to review the propriety of the district court's entry of judgment against the Petitioners, concluded that they had failed to meet the burden of justifying the restrictions upon commercial speech imposed by their ordinances. The court of appeals accepted the Petitioners' contention that aesthetics and traffic safety—when viewed in the abstract—were legitimate governmental interests; nonetheless, it held that it could not assume, in the absence of any positive evidence, that the Petitioners actually sought to advance those interests by restricting constitutionally protected speech.

SUMMARY OF ARGUMENT

The Petitioners' sign ordinances are unconstitutional under the principles enunciated by this Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Those ordinances discriminate against non-commercial speech in favor of commercial speech. They also contain content-based exceptions to the general ban on outdoor advertising for certain types of non-commercial speech. Furthermore, Petitioners never presented evidence of any governmental interests those ordinances were intended to advance. The invalidation of those ordinances by the lower courts, therefore, was consistent with the uniform holdings of this Court and the circuit courts of appeals.

REASONS FOR DENYING THE WRIT

POINT I

THERE IS NO CONFLICT BETWEEN THE FEDERAL CONSTITUTIONAL QUESTIONS DECIDED BY THE COURTS BELOW AND THE APPLICABLE DECISIONS OF THIS COURT.

It is well-established that municipalities must justify their ordinances when they substantially restrict constitutionally protected speech. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

In the case at bar, the sign ordinances of the Petitioners mirror the ordinance struck by this Court in *Metromedia*: commercial on-premises signs are allowed; non-commercial off-premises messages are prohibited. *Compare with Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513-14 (1981). Moreover, the exemptions to the ordinances' restrictions, like those before this Court in *Metromedia*, require examination of the content of non-commercial messages. In most instances, whether off-premises non-commercial signs are exempted or prohibited turn on whether or not they convey messages approved by the ordinances.[1] *Compare with id.* at 514.

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[1] Babylon's sign ordinance provides that the only type of ground signs allowed are those which advertise a product or service offered by a business or industry located at the premises on which the sign is erected, *i.e.*, on-premises commercial signs. BABYLON, N.Y., CODE art. XIX, §§ 213-253(G)(1) and (2), 213-255(C)(1). In addition, Babylon's sign ordinance contains exceptions to its general ban on

Thus, as the Second Circuit declared in its decision below, "this case is really quite simple. [The] challenged ordinances are unconstitutional because they fail to follow basic constitutional dictates concerning a municipality's ability to restrict speech." *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990); Exhibit A at A-8.[2]

In addition to the basic infirmities revealed by the inability of the drafters of the Petitioners' sign ordinances to comply with the principles of *Metromedia*, the Petitioners themselves, in their defense to the allegations of the complaint at bar, offered no justification for the ordinances, either by way of a stated legislative purpose or by extrinsic evidence of any governmental interest sufficient to uphold the restrictions upon protected speech. This failure is crucial, because under the test this Court set forth in *Central Hudson* and *Metromedia*—the test that the courts below applied to Petitioners' ordinances—the Petitioners have the burden of demonstrating the governmental inter-

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non-commercial advertising in favor of a few types of non-commercial speech. For example, temporary political campaign signs and temporary signs advertising annual or semi-annual events of non-profit organizations are permitted. *Id.* at §§ 213-253(Q)(1), 213-255(A).

Hempstead's sign ordinance authorizes ground signs subject to the proviso that they advertise only the business, products or services provided on the premises. HEMPSTEAD, N.Y., BUILDING CODE ORDINANCE art. XXIV, § 244(F)(2)(a) & (b). Hempstead's ordinance also contains content-based restrictions for certain types of non-commercial speech. For example, it allows the erection of a "religious sign" as well as informational signs "displayed for the safety of the public" and certain mobile "political" signs. *Id.* at § 244(A)(1)(b), (A)(1)(f)[1], (F)(2)(h)[2].

[2] References to the exhibits accompanying the Petition for Writ of Certiorari will be designated as "Exhibit" followed by the appropriate exhibit letter.

ests served by their legislation.[3] Thus, as this Court said in *In re R.M.J.*, 455 U.S. 191, 206 (1982), "[W]e deal with a silent record." (regulation of commercial speech invalid where record silent with respect to governmental interests sought to be advanced).

The district court first found that there was no reason to doubt that the speech at issue here concerned lawful activity and was not misleading. *National Advertising Co. v. Town of Babylon*, 703 F. Supp. 228, 234 (E.D.N.Y. 1989); Exhibit B at B-12. The district court then found that Petitioners failed to meet their burden under the *second* prong of the *Central Hudson* test. That is, since Petitioners had not included any precise statement of purpose in their sign ordinances and did not, in the alternative, present any other evidence to the court to establish the objectives underlying the ordinances, the court could not determine that their ordinances sought to promote substantial government interests. *Id.* at 235; Exhibit B at B-12 to -13. The district court accordingly struck down Petitioners' ordinances. *Id.*; Exhibit B at B-12 to -13. The court of appeals agreed with the district court and upheld its decision as to Petitioners in its

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[3] This Court has established a four-part test that governmental entities must satisfy in order to justify ordinances that restrict commercial speech:

1. To warrant protection under the First Amendment, the speech must not concern an unlawful activity or be misleading;
2. If the speech warrants First Amendment protection, the ordinance must seek to implement a substantial governmental interest;
3. The ordinance must directly advance that interest; and
4. The ordinance must be narrowly drawn to accomplish the asserted governmental objective.

Metromedia, above, 453 U.S. at 507; *Central Hudson*, above, 447 U.S. at 563-66.

entirety. *National Advertising*, above, 900 F.2d at 556; Exhibit A at A-8 to -10.

None of the decisions of this Court cited by the Petitioners is to the contrary. Petitioners cite to several decisions of this Court that they claim compel the conclusion that the courts below failed to apply the correct test to review their ordinances. None of those decisions, however, holds that a court, in the absence of evidence, can take judicial notice of the alleged purposes which led to the enactment of legislation affecting basic constitutional rights. Only one of them, *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), comes close to touching on the precise question involved here.

In *Posadas*, this Court rejected a First Amendment challenge to a Puerto Rico statute that prohibited local casinos from advertising to Puerto Ricans. Even though the statute contained no precise statement of its purpose, this Court determined that the Puerto Rico legislature had enacted it to serve a legitimate governmental interest. *Id.* at 341.

This Court, however, did not make the determination in *Posadas* on a blank slate. First, the record in that case showed that the local Puerto Rico courts had found that the legislature had intended the statute to discourage gambling among the local population. *See id.* at 334. Because of Puerto Rico's unique cultural and legal status, this Court held that special deference should be given to those findings. *See id.* at 339 n.6. Second, the record contained extrinsic evidence of the governmental interest behind the statute in the form of an admission by the party challenging the statute, conceding that the legislature had intended to keep Puerto Ricans away from casinos by passing the statute. *See id.* at 341.

In contrast, the ordinances at issue here are not statutes of a government such as Puerto Rico with a unique relation to the federal system. Nor does the record below contain any admission against interest—or any other extrinsic evidence—of any proper governmental purpose to the ordinances. Thus, Petitioners' argument based on an alleged conflict with *Posadas* should be rejected by this Court.

Likewise, this Court should reject Petitioners' contention that the Second Circuit's decision is inconsistent with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1989). In *Renton*, the legislation at issue "by its terms" indicated that it was enacted to prevent crime, protect the city's retail trade and maintain property values. *Id.* at 48. Thus, this Court, as in *Metromedia*, could look to the statute itself for the expression of legislative purpose behind its enactment.

In this case, however, there is no evidence in the record to establish what considerations led Petitioners to enact their sign ordinances. Consequently, there is no indication that the experiences of other municipalities—as relied upon in *Renton*—were ever brought to the attention of the framers of the ordinances.

The courts below properly placed the burden on Petitioners to demonstrate the legitimate governmental interests served by their restriction of First Amendment activity. Petitioners apparently feel that they did not have to comply with that requirement. Plaintiffs obstinately refuse to recognize, however, that:

> [T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to deter-

> mine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial government interest," . . . the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*."

Schad, above, 452 U.S. at 77 (Blackmun, J., concurring) (citation omitted). Ignoring that command from this Court, Petitioners never introduced any evidence to satisfy the *Central Hudson* test. The Petition for Writ of Certiorari, therefore, should be denied.

POINT II

THERE IS NO CONFLICT AMONG THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS ON THE ISSUE RAISED BY PETITIONERS.

In addition to arguing that the Second Circuit did not follow the precedents of this Court, Petitioners argue that the Second Circuit's decision, along with the Eleventh Circuit's decision in *Dills v. Marietta*, 674 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), diverges so substantially from the approach of the other United States circuit courts of appeals on First Amendment questions that "the very foundation of our system of jurisprudence" is put at risk. Pet. at 15. That argument lacks support even in the cases upon which Petitioners rely.[4]

Like the Second Circuit here, the Eleventh Circuit in *Dills* applied the principles of *Central Hudson* and *Metromedia*. In that case, the Eleventh Circuit held that, although the statement of purpose in Marietta's sign ordinance supported counsel's claim that the city intended the ordinance to promote traffic safety, counsel's claim that the city also intended the ordinance to promote aesthetics had to be rejected. The court reached that conclusion because the ordinance's statement of purpose did not support that claim and because counsel offered no extrinsic evidence to show such intent. *Dills*, above, 647 F.2d at 1381.

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[4] Petitioners also claim that the Second Circuit's decision conflicts with decisions of the Court of Appeals of the State of New York. Pet. at 12. Petitioners cite to no decisions of the latter court. Accordingly, National need not discuss that issue.

Thus, far from "pass[ing] beyond any stated purpose and delv[ing] into the hearts and minds of the legislators who voted for the statute to ascertain their true motivation," Pet. at 14, the Eleventh Circuit, in the absence of a stated purpose or extrinsic evidence, simply refused to speculate or allow counsel to speculate on additional interests the city might have intended to serve with its ordinance.

In similar fashion, the court in *Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County, Georgia*, 738 F. Supp. 1431 (N.D. Ga. 1990), struck in its entirety an ordinance prohibiting all off-premises signs in the absence of any evidence of the governmental interests that the county sought to advance in enacting the measure. The court declared:

> Like the Eleventh Circuit, this court cannot permit defendant to justify its restriction of protected speech with after the fact invocations of esthetics and traffic safety. Absent any evidence that these concerns actually contributed to the passage of defendant's ordinance, the court finds that it fails to satisfy the second part of the *Central Hudson* test and must be declared unconstitutional.

Id. at 1433. Thus, the courts in *Dills* and *Adams* followed the approach taken by the lower courts in this case.

The allegedly contradictory decisions cited by the Petitioners do not conflict with the principles followed by the Second and Eleventh Circuits. In each of those cases, the courts either did not reach the issue or reached it, but had before them a statement of legislative purpose or extrinsic evidence of that purpose in the record. In not one instance did the court either hold or imply that it could take judicial notice of the interests to be served by

the particular legislation under consideration in the absence of any stated purpose or extrinsic evidence.

For example, in *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988), the ordinance at issue in that case contained an express provision stating that its purpose was to "enhance aesthetic values in the City . . . . " ORANGE, CAL., MUN. CODE § 17.78.020; Record on Appeal, Volume I at 96, *National Advertising Co. v City of Orange*, 861 F.2d 246 (9th Cir. 1988). Thus, the Ninth Circuit never had to address the issue raised here because the ordinance under scrutiny contained its own statement of purpose.[5]

The decisions of the Fourth Circuit cited by Petitioners are also inapposite. In *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987), the Fourth Circuit relied on the city's assertion that it intended its ordinance to promote aesthetics and traffic safety. The

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[5] The Ninth Circuit, however, did dispose of the contention raised by Petitioners that there can be no violation of the First Amendment when an ordinance "regulate[s] both off-premises commercial and non-commercial speech equally." Pet. at 16. As the Ninth Circuit declared:

> Merely treating noncommercial and commercial speech equally is not constitutionally sufficient. The first amendment affords greater protection to noncommercial than to commercial expression. *Metromedia*, 453 U.S. at 506–07, 520, 101 S.Ct. at 2982, 2899. Regulations valid as to commercial speech may be unconstitutional as to noncommercial. *Id.* at 506-07, 101 S.Ct. at 2891-92; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983).

National Advertising, above, 861 F.2d at 248.

Petitioners fail to note, however, that the city had supported that assertion in the district court with extrinsic evidence in the form of affidavits and records of public hearings. *See Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1451, 1452 n.4 (E.D.N.C. 1985), *aff'd*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

Similarly, in *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987), the plaintiffs, while challenging the city's ordinance as an unconstitutional restriction on commercial speech, admitted that one of the primary purposes of the ordinance was promotion of aesthetics. Thus, the second prong of the *Central Hudson* test was satisfied in that case through extrinsic evidence of the legislative purpose behind the challenged ordinance.

The decisions of the First, Third and Sixth Circuits cited by the Petitioners are also consistent with the decisions of the Second and Eleventh Circuits. Petitioners claim that the First Circuit took a "contradictory approach" in *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985), and *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980), *aff'd mem.*, 453 U.S. 916 (1981). *See* Pet. at 13. Petitioners, however, do not cite to any specific pages in these decisions to support that claim. A brief examination of those cases, though, reveals their assertion to be mistaken.

In *Matthews*, the First Circuit never reached the question of what governmental interest the ordinance might have been intended to serve. Instead, it found the ordinance unconstitutional on its face for discrimination against non-commercial speech in favor of commercial speech. *Matthews*, above, 764 F.2d at 59. In *John Donnelly & Sons*, the First Circuit relied expressly on the preamble of the challenged statute to determine the

governmental interests—tourism, highway safety and aesthetic values—allegedly served by it. *John Donnelly*, above, 639 F.2d at 7, 10-12. Thus, those cases are thoroughly consistent with the decisions of the courts below here.

Likewise, in *Frumer v. Cheltenham Township*, 709 F.2d 874 (3d Cir. 1983), the Third Circuit did *not* decide, as Petitioners claim, that "a municipality need not establish its governmental interest . . . by empirical data." Pet. at 13. Instead, the Third Circuit held that a municipality does not have to give a "detailed empirical showing that the regulation in issue *actually advance[s] the asserted governmental interests*." *Frumer*, above, 709 F.2d at 877-78 (emphasis added). The question in that case, therefore, was not the identity of the governmental interests the challenged regulation was designed to advance, which is the second part of the *Central Hudson* test. Rather, the issue was the showing necessary to establish the nexus between those interests and the means chosen to promote them, which is the third prong of the *Central Hudson* test.

Finally, in *Wheeler v. Comm'r of Highways of Kentucky*, 822 F.2d 586, 587 (6th Cir. 1987), the Sixth Circuit relied specifically upon the challenged billboard statute's statement of purpose to identify the governmental interest the legislature had intended the statute to serve.

Thus, there simply is no split among the courts of appeals on the issue raised by Petitioners. The courts of appeals consistently hold that a governmental entity bears the burden of proving the interests sought to be advanced by its restrictions on protected speech. Those interests can be found in a statement of legislative purpose within the statute. They can also be found in extrinsic evidence such as records of public hearings. In the absence of such evidence, however, the courts will

not speculate on those interests. Instead, they will invalidate the restrictions as unconstitutional.

CONCLUSION

Petitioners claim the decision of the Second Circuit has unfairly placed a "burden" on them. Pet. at 14. That "burden," however, is the burden this Court requires every governmental entity to satisfy when it attempts to restrict speech protected by the First Amendment. Far from "risk[ing] the very foundation of our system of jurisprudence," Pet. at 15, this approach requires governmental entities to take seriously their constitutional responsibilities in our federal system. There is no reason to change this long-standing rule. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-159

**TOWN OF BABYLON and
TOWN OF HEMPSTEAD,**

Petitioners,

-against-

**NATIONAL ADVERTISING COMPANY,
INCORPORATED VILLAGE OF LINDENHURST,
TOWN OF OYSTER BAY, INCORPORATED,
VILLAGE OF FREEPORT, TOWN OF ISLIP,**

Respondents.

PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

This brief is submitted in support of Petitioners', Town of Babylon and Town of Hempstead, Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit respecting new cases available since the filing of the petition and in reply to the brief in opposition submitted by Respondent National Advertising Company, (hereinafter "National').

REASONS FOR GRANTING THE WRIT

POINT I

THE PETITION SHOULD BE GRANTED, SINCE THE TEST PROMULGATED BY THE COURT OF APPEALS IS INTERNALLY FLAWED, IS CONTRARY TO THE HOLDINGS OF THIS COURT, IS IN CONFLICT WITH THE POSITION OF SEVERAL OF THE OTHER CIRCUITS, AND UNDERMINES THE BASICS PRECEPTS OF CONSTITUTIONAL ANALYSIS.

Petitioners argue that the Court of Appeals for the Second Circuit crafted a new and distinct form of constitutional scrutiny which conflicts with the principles long established by this court, and permits it to circumvent the applicable first amendment standards. Petitioners further argue that the Second Circuit's test conflicts with the position adopted by several other circuits and is inherently flawed.

National Advertising Company (the Plaintiff below), in its brief in opposition, maintains that the test crafted by the Court of Appeals represents a mere extension of the general principle that a municipality bears the burden of justifying an ordinance which impacts upon free speech. National's argument misses the point. It is not the nature of the burden which Petitioners dispute, but the method of satisfying that burden. Moreover, National's position completely fails to appreciate the essence and effect of the Second Circuit's preliminary question.

Initially, National misconstrues *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41, 106 S.Ct. 926, 89 L.Ed.2d 29 (1986). This Court's holding in that case functions to permit a municipality to sustain its burden by citing published opinions in lieu of empirical evidence. The mere presence or absence of a legislative purpose provision does not alter this precept. As long as the cases cited are relevant, a municipality is entitled to rely thereon. As this Court plainly stated, "The First Amendment does not require a city, before enacting ... an ordinance, to conduct new studies or provide evidence independent of that clearly generated by other cities, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem the city addresses." *City of Renton*, 475 U.S. at 51-52, 106 S.Ct. at 931. By requiring "extrinsic evidence" in the absence of a legislative purpose provision, the test crafted by the Second Circuit substantially undermines this court's holding in *City of Renton*.

Moreover, as both the existence of the governmental interest and the relationship between that interest and restrictions on outdoor signs has been established by this Court, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-512; 101 S.Ct. at 2882, 2892-2895, 69 L.Ed.2d 800 (1981); *Members of City Council v. Taxpayers for Vincent*, 446 U.S. 789, 806-807, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984); *see also, Board of Trustees of the State University of New York v. Fox*, —— U.S. ——, 109 S.Ct. 3029, 106 L.Ed.2d 308 (1989); *Regan v. Time*, 468 U.S. 641, 656, 104 S.Ct. 3262, 3271, 82 L.Ed.2d 487 (1984), Petitioners plainly satisfied their burden by citing the relevant opinions of this Court and the lower courts. The only remaining issue is the particular distinctions of the challenged ordinances. However, the Second Circuit refused to accord Petitioners their right to rely on those decisions. The Second Circuit's preliminary question directly

undermines *City of Renton,* and effects a refusal to recognize or apply *Metromedia, Members of City Council, Fox* and *Regan.*

Second, National fails to recognize that the commercial speech test applies only to the off-premises copy restrictions. A content-neutral restriction on speech will be upheld if it is narrowly tailored to serve a significant governmental interest, but it need not be the least restrictive or least intrusive means of doing so. *Ward v. Rock Against Racism,* —, U.S. —, —, 109 S.Ct. 2746, 2757-2758, 105 L.Ed.2d 661 (1989). *See also Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 642, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), this Court expressly held that a municipality possesses substantial interests in esthetics and traffic safety, which are sufficient to justify content-neutral regulations of outdoor signs and billboards. 466 U.S. at 806-807, 104 S.Ct. 2129-2130. See also *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 784, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). While this Court did not pass on San Diego's content-neutral restrictions in *Metromedia,* it has subsequently approved the holdings of other courts in this regard.

In *Regan v. Time, Inc.,* 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 987 (1984), this Court endorsed the conclusions of the United States Court of Appeals for the Ninth Circuit in *Baldwin v. Redwood City,* 540 F.2d 1360, 1368, (9th Cir. 1976), *cert denied,* 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d

223 (1977) (holding 16 foot area restriction per sign and aggregate area restriction of 80 square feet per parcel does not offend the First Amendment), the Supreme Court of New Mexico in *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 F.2d 565 (1982) (upholding number, height and size of restrictions on outdoor signs as serving substantial governmental interest in esthetics and traffic safety), and the Appellate Court of Illinois in *Krych v. Village of Burr Ridge*, 111 Ill.App.3d 461, 444 N.E.2d 229 (1982) (upholding height, size and construction restrictions on outdoor signs as serving substantial governmental interest in esthetics and traffic safety). *Regan*, 468 U.S. at 656, 104 S.Ct. at 3271.

Certainly it is now beyond dispute that substantial governmental interests in traffic safety and esthetics exist with respect to the regulation of outdoor signs. It is similarly clear that the height, size, location and design restrictions represent reasonable determinations of local legislatures which serve to protect and advance those firmly established governmental interests. The Second Circuit's standard, however, allows a court to circumvent these well-established principles.

Finally, the test itself is inherently flawed both in design and function. National's attempt to boot-strap that test and belittle its practical effect are simply unavailing. National fails to cite any authority for the existence or propriety of the two-pronged Preliminary Question itself, other than *Dills v. City of Marietta*, 674 F.2d 1377 (11th Circ. 1982), *cert. denied*, 461 U.S. 905, 103 S.Ct., 1873 76 L.Ed.2d 806 (1983), which is similarly flawed and misplaced. Further, its attempts to distinguish the opinions of the First, Third, Fourth, Fifth, Sixth and Ninth Circuits cited by Petitioners on the sole grounds that the cases satisfied either one prong or the other, (i.e. if no

extensive evidence existed, a legislative purpose provision was contained in the statute, or vice versa), are simply unavailing and the argument illusory. The cases cited by Petitioners simply do not stand for the principles National espouses. In none of those cases was a legislative purpose provision required prior to an evaluation of the relevant governmental interests; nor did the terms of such a provision restrict the scope of those interests. The issue was not whether a legislative purpose provision did in the abstract exist, but what effect the provision was accorded.

Similarly, the issue is not whether any evidence was offered, but whether such was required prior to an evaluation of an asserted governmental interest, or whether such was offered to establish such an interest when this Court has recognized both the interest and the nexus between the interest and the type of regulation in question.

The position of the First, Third, Fourth, Fifth, Sixth and Ninth Circuits clearly rejects that of the Second and Eleventh Circuits. *See National Advertising Company v. City of Orange*, 861 F.2d 246 (9th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987); *Georgia Outdoor Advertising v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987), *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied* 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 1865 (1987); *Frumer v. Cheltenham Township*, 709 F.2d 874 (3rd Cir. 1983); *Wheeler v. Commissioner of Highways of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *John Donnelly and Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980) *aff'd.mem.*, 453 U.S.

916, 101 S.Ct. 3151 69 L.Ed.2d 999 (1981). As such, a conflict clearly exists.

Further, the position of those courts is in clear accord with the position of this Court, which provides that a court is not limited to receive assertions of governmental interests from the two sources delineated by the Second and Eleventh Circuits; and should assess all advanced governmental interests regardless of the existence of a legislative purpose provision or the offer of "extrinsic evidence", *Posadas de Puerto Rico Association v. Tourism Company*, 478 U.S. 328, 341-342, 106 S.Ct. 2968, 2976-2977, 92 L.Ed.2d 266 (1986).

The Second Circuit's test itself remains inherently flawed. The reliance on legislative purpose is misplaced, since it is elementary that the motivations of the enacting legislature are irrelevant and a statute will not be struck on the basis of an alleged illicit legislative motivation. Eg., *City of Renton v. Playtime Theatres*, 475 U.S. at 46-49, 106 S.Ct. at 928-930; *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968). The test also supplants governmental interest, the prime component in constitutional analysis, with legislative purpose, which is an issue restricted to statutory construction. Moreover, the abstract existence of extrinsic evidence does not determine whether constitutional analysis will be conducted. Further, the two enunciated factors do not restrict the parameters of the field of governmental interests which will be received. Finally, such evidence is simply not required in the present case.

The Second Circuit fabricated a new and distinct standard of constitutional scrutiny, internally flawed and at odds with the proclamations of this Court and several of the other cir-

cuits. That standard functions to allow a lower court to circumvent this Court's holdings. Such plainly demonstrates a compelling reason for granting the petition.

POINT II

SEVERAL RECENT DECISIONS FURTHER SUPPORT PETITIONERS' POSITION AND A GRANTING OF THE PETITION.

Further support for granting the petition may be found in the Fourth Circuit's recent decision in *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990), in which the court considered a municipal ordinance which restricted the height of radio antennas. The statute plainly embraces First Amendment concerns regarding both commercial and non-commercial speech. The single paragraph ordinance did not contain any legislative purpose provision. (See Columbia, South Carolina City Code § 6-3099). The Court did not require any "extrinsic evidence" to establish the governmental interest in regulating the height of such structures. The Fourth Circuit upheld the ordinance as a valid content-neutral restriction and not an unconstitutional infringement on the right of free speech.

The conflict which exists between the circuits on an issue of prime import, in itself, provides an important reason for granting the petition. When combined with the conflict between that position and the stated position of this Court, and the impact the test can foster upon the effectuation of the holdings of this Court, the reasons for granting the petition are compelling.

Additional support may also be found in this Court's recent opinion in *Hodgson v. Minnesota,* —— U.S. ——, 110 S.Ct. 2926, —— L.Ed.2d —— (June 25, 1990), which concerned a Minnesota abortion statute that required parental notification and a 48-hour waiting period between notification and perfomance of the abortion. While the case does not concern commercial speech, similarities between that case and the present do exist. (Further, the test delineated by the Second Circuit is not absolutely restricted to free speech cases, and bears the striking possibility of being applied more broadly). In *Hodgson* this Court did not require either a legislative purpose provision or "extrinsic evidence" in order to establish the "strong and legitimate (governmental) interests in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely, or that those interests justify a requirement that a minor notify and consult with a parent prior to the performance of an abortion". *Hodgson v. Minnesota,* —— U.S. at ——, 110 S.Ct. at 2942.

This Court relied entirely upon the principles expressed and reasoning inherent in its prior holdings to establish the governmental interests at issue and the nexus between those interests and the type of regulation at issue. *Id. See also* Minn. Stat. 144.343 which does not contain a legislative purpose provision. (This Court did however rely upon the findings of fact reported in the opinion of the District Court after trial in analyzing the particular provisions which distinguished the Minnesota Statute from parental notification and consent statutes, the court had cause to previously examine; *see Hodgson v. Minnesota,* —— U.S. at ——, 110 S.Ct. at 2937-2941.)

Quite plainly, the test delineated by the Second Circuit

remains inapposite to the position of this Court and, given the ability of that standard to undermine the implementation of the holdings of this Court, there exists compelling reasons for granting the petition.

CONCLUSION

The opinion of the Second Circuit creates a new and distinct standard of constitutional scrutiny which provides that unless a municipality can either produce a legislative purpose provision inherent within the statute or offer "extrinsic evidence" of the concerns which motivated the legislature to enact the statute, a court will not conduct constitutional review and will strike the statute in its entirety. The test thus functions as a new and distinct preliminary question in all free speech cases, and lends itself to a broader application. Further, that test directly conflicts with the position of this Court and permits a lower court to circumvent this Court's prior holdings. The position of the Second Circuit, while harmonious with that of the Eleventh Circuit, conflicts with that of the First, Third, Fourth, Fifth, Sixth and Ninth Circuits.

Moreover, the test itself is internally flawed. It confuses legislative motivation with governmental interest and elevates the former from its role in statutory construction and interjects it, in place of the latter, into constitutional analysis. The test then intertwines legislative purpose with the unrelated evidentiary issue of "extrinsic evidence," and requires, contrary to the proclamations of this Court, that such evidence must, in the abstract, be offered in order for the statute to be afforded constitutional scrutiny.

Finally, the test imposes additional and substantial burdens

upon the legislature without providing any corresponding benefit to those who wish to engage in the regulated activity or the population in general.

It is clear that, in the present case, special and important reasons exist for the granting of this petition.

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